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No. _____

In The

Supreme Court of the United States

October Term, 1997

PRESCOTT CONVENTION CENTER, INC.,

Petitioner,

v.

HAROLD SCOTT, TONY WEST, and
YAVAPAI-PRESCOTT INDIAN TRIBE,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In order to determine whether a state can impose a sales tax on a tribally-owned hotel on an Indian reservation, "Indian preemption" law requires courts to balance the respective federal, state and tribal interests involved. Three questions are presented:

1. Can Arizona tax the operations of a hotel that is owned and regulated by an Indian tribe, which was specifically designed and federally-funded to promote the Tribe's economic development?

2. In assessing whether federal law preempts a state's attempt to tax a tribally-owned hotel, do separation-of-powers concerns allow a federal court to second-guess the Executive Branch's determination that the hotel advances significant federal and tribal interests?

3. When an Indian tribe's use of non-Indian assistance is federally required and advances federal and tribal interests, does that involvement nonetheless diminish the federal and tribal interests to be considered in determining whether a state can tax the project?

LIST OF PARTIES AND RELATED ENTITIES

Petitioner Prescott Convention Center, Inc. ("PCC") is an Arizona corporation. Respondents are Harold Scott, Tony West, and the Yavapai-Prescott Indian Tribe.

The corporate parent of PCC is W.M. Grace Development Co., a Missouri corporation, which is a wholly-owned subsidiary of W.M. Grace Co., Inc., also a Missouri corporation. (These entities are not related to W.R. Grace & Co., a large publicly-traded company.) PCC has no non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Prescott Convention Center, Inc. ("PCC") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on June 30, 1997.

OPINIONS BELOW

The majority and dissenting opinions of the United States Court of Appeals for the Ninth Circuit are reported at 117 F.3d 1107 (9th Cir. 1997). They are reprinted at App. 1. The District Court's unreported decision is reprinted at App. 27.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its judgment and opinion on June 30, 1997. The Ninth Circuit denied the Petition for Rehearing and Suggestion for Rehearing En Banc on August 12, 1997. Pursuant to Supreme Court Rule 13.1, this petition has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. Const. Art. VI, cl. 2 provides that federal laws "shall be the supreme Law of the Land."

25 U.S.C. § 415 provides that tribal land "may be leased by the Indian owners, with the approval of the Secretary of the Interior, for . . . business purposes . . . ."

25 C.F.R. § 162.5 provides that "no lease [of tribal land] shall be approved or granted at less than the present fair annual rental."

STATEMENT OF THE CASE

The Tribe invoked the District Court's jurisdiction under 28 U.S.C. §§ 1362 and 1651. The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1891. The course of the proceedings is summarized below.

Essential Facts

In 1982, the Yavapai-Prescott Indian Tribe ("Tribe") was a destitute band of about 140 persons, who lived on a small reservation near Prescott, Arizona. The Tribe resolved to pursue economic development by developing a resort hotel on its reservation. To fund the project, the Tribe sought and received a $1.1 million grant from the U.S. Department of Housing and Urban Development ("HUD").

As one condition of the grant, HUD required the Tribe to hire a private developer to build and operate the hotel. The Tribe and petitioner PCC thus entered a lease,

which the Secretary of the Interior reviewed and approved. The lease entitles the Tribe to receive "rent" in amounts that are tied to the economic fortunes of the hotel. The Tribe invested its $1.1 million to fund the hotel's construction, and holds title to the hotel itself.

Because of the Tribe's small population and lack of expertise, PCC manages the hotel's daily operations. The Tribe however, actively enforces Tribal health and safety ordinances and operates the adjacent casino. The Tribe and the federal government bear the financial burden of providing law enforcement, fire protection, water service, health and environmental services, and traffic control, even though the State of Arizona and its subdivisions provide these services to similar businesses located off the reservation.

Due to its own efforts, the Tribe now owns a first-rate hotel that generates revenue to support the Tribe's government and population. Guests are attracted to the reservation and remain for extended periods of time due to the natural beauty of the reservation, the quality of the Tribal accommodations, and the proximity of the Tribe's self-managed casino. This case arose when Arizona attempted to impose its general transaction privilege tax on revenue generated from the rental of hotel rooms, as well as ancillary sales of food and beverages.

Proceedings Below

The Tribe filed suit in the United States District Court for the District of Arizona, naming as defendants the Director of Arizona Department of Revenue, the Treasurer of the State of Arizona (the "State defendants"), and

PCC. The District Court had jurisdiction under 28 U.S.C. §§ 1362 and 1651. The Tribe sought declaratory relief that Arizona's taxes were preempted by federal law, and an injunction prohibiting the collection and/or payment of the taxes. PCC filed a cross-claim against the State defendants, also alleging that the taxes were preempted, over which the District Court had jurisdiction pursuant to 28 U.S.C. § 1367.

The District Court denied the State defendants' motion to dismiss PCC's cross-claim, and granted the Tribe's and PCC's motions for summary judgment on the merits. In a memorandum decision, the District Court concluded that Arizona's taxes were preempted. App. 27.

The District Court entered a declaratory judgment and injunction on June 10, 1996. App. 63. The State defendants filed a timely notice of appeal on July 9, 1996. The Ninth Circuit had jurisdiction under 28 U.S.C. § 1891.

The Ninth Circuit issued a split decision on June 30, 1997. App. 1. The panel majority identified eight "facts" that favored preemption and listed six "factors" that weighed against it. The majority concluded that the balance favored the State defendants, since the Tribe could not quantify the exact percentage of the hotel's revenues that reflected the Tribe's theoretical contribution to the value being sold.

In a thorough dissent, Judge Pregerson noted that the hotel represented a genuine, federally-supported effort to generate value on the reservation. App. 17. The dissent concluded that the comprehensive scheme regulating leases of tribal lands, as well as the Indian Gaming Regulatory Act, preempted Arizona's taxes. The Ninth Circuit

denied the petition for rehearing and rejected the suggestion for rehearing en banc on August 12, 1997. App. 61.

REASONS FOR GRANTING THE WRIT

The questions presented cut to the essential integrity of the "Indian preemption" doctrine. For more than thirty years, this Court has applied special rules to determine if federal law preempts a state's attempt to tax and regulate commerce on an Indian reservation. Although the doctrine is largely *ad hoc*, one bedrock principle has been that the political branches, not the judiciary, determine the substantive federal interests at stake. This area of the law loses any claim to doctrinal consistency or analytical integrity if federal courts can inject their own alternative views of federal Indian policy.

I. THE NINTH CIRCUIT HAS UNDERMINED THE INTEGRITY OF THE "INDIAN PREEMPTION" DOCTRINE BY SECOND-GUESSING THE POLICY DECISIONS OF THE EXECUTIVE BRANCH AND CONGRESS.

A. This Court Has Not Explored How The Indian Preemption Doctrine Should Account For The Involvement Of Non-Indians.

Two principles of federal Indian law collide when an Indian tribe relies on non-Indian resources to promote the tribe's own economic development. On one hand, state taxes should only be preempted when an enterprise involves *tribal* economic development, and non-Indian

businesses do not gain a tax exemption merely by locating on the reservation. On the other hand, the scarcity of tribal capital and management expertise is what animates the federal commitment to tribal economic development, and federal policy recognizes that Indian tribes cannot develop profitable enterprises from scratch.

This Court has not explained how to reconcile these rules when an Indian tribe must use non-Indian capital and expertise to promote its own economic development. The Ninth Circuit panel disagreed sharply as to the legal significance of PCC's role – not only as to its degree but also on the more basic question whether it militated for or against Arizona's authority to tax the hotel. The four federal judges who have heard this case split evenly on whether PCC's role de-legitimizes what is clearly genuine tribal economic development.

B. The Ninth Circuit Undermined the Legitimacy of the Indian Preemption Doctrine by Flouting the Policy Judgments of the Other Branches.

The more important issue is not whether Arizona can properly tax the Tribe's hotel, but whether the Court of Appeals could properly ignore the other branches' policy judgments in answering that question. Although this Court has not explicitly recognized that non-Indians can sometimes catalyze tribal economic development, Congress and the Executive Branch clearly have. The Ninth Circuit's decision subverts the theory behind the "Indian preemption" doctrine, because the political branches, not the judiciary, should define the federal policies that are weighed in the balance.

But for PCC's involvement, federal law would clearly prohibit Arizona from taxing the hotel. In *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), the Court held that a state could tax retail sales on the reservation because importing finished goods for immediate resale did nothing to generate value on the reservation. In contrast, the Court struck down attempts to regulate a tribal hotel in *New Mexico v. Mescalero Apache Tribe*, 402 U.S. 324 (1983), because the hotel marketed "value generated on the reservation by activities involving the Tribe." *Id.* at 341. Likewise, the Court struck down California's attempts to regulate reservation bingo parlors in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), because they generated value in the form of "recreational opportunities and ancillary services" at which guests "spent extended periods of time." *Id.* at 212. Arizona's taxes are preempted under this rationale, since a hotel-and-casino only differs from a bingo parlor in ways that present a *stronger* case for preemption.

According to the Ninth Circuit, this case requires the opposite result, because the Tribe used outside expertise to operate its hotel. The Court of Appeals concluded that PCC's involvement diminished the federal and tribal interests, thereby tilting the balance in Arizona's favor. The problem is that the Executive Branch concluded that federal and tribal interests were furthered, not diminished, by adding non-Indian capital and expertise to the mix.

While this hotel was being planned, the President of the United States explicitly declared that a goal of federal Indian policy was to increase the involvement of non-

Indian capital and management expertise in order to promote tribal economic development. 19 Weekly Comp. of Pres. Doc. 99 (1983). This Court has acknowledged and tried to effectuate this policy. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 217 & n.20 (citing President's 1983 Statement on Indian Policy).

Two executive departments – HUD and Interior – decided that this particular hotel was a valuable economic venture for this Tribe. HUD awarded the Tribe $1.1 million to invest in the hotel on the condition that the Tribe enlist a private manager to operate the hotel. The Secretary of the Interior then reviewed and approved the Tribe's lease with PCC, finding that it was in the Tribe's best interest. The Executive Branch recognized that a Tribe of 140 persons lacked the financial and human resources needed to construct and operate an economically viable hotel.

The Ninth Circuit did not explicitly disagree with those decisions, but its analysis betrayed a conviction that this was not the kind of project favored by federal Indian policy. For instance:

- The majority complained that the lease entitles the Tribe to only 20% of the hotel's net cash flow, thereby second-guessing (and implicitly criticizing) the Interior Department's approval of the lease.
- The majority objected that the Tribe itself invested "only" $1.1 million in the project, thus faulting both HUD's efforts and, ultimately, the Tribe's own poverty.
- The majority noted that the hotel created few jobs for tribal members, implying that tribal

economic development should consist exclusively of the creation of unskilled jobs.

The majority apparently felt uncomfortable with a tribe that endeavored to own the hotel, rather than to cook the meals and clean the rooms. The majority instead demonstrated a preference for purely tribal enterprises, in which Indian tribes raise all the capital, do all the work, and supply all the management expertise. Whether or not this is good policy, it is clearly different than the policy set by the other branches.[1]

No one contends that a tribe's relationship with non-Indians necessarily advances federal Indian policy, much less that it always preempts state taxes. In this case, however, the non-Indian involvement grew out of a specific federal effort to help this Tribe. The Ninth Circuit's decision misconceives the role of the judiciary and erodes the legitimacy of the Indian preemption doctrine, which has no *raison d'etre* except to effectuate policies that are determined by the other branches.

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[1] The Ninth Circuit's analysis also denigrated the policies of Congress, which has encouraged tribal economic development through leases of the type involved here. The lease in this case was approved under 25 U.S.C. § 415, which authorizes leases of tribal lands to generate "much-needed income" for tribes that own lands that could be developed with a "substantial outlay of capital by the prospective lessee." H.R. 1093, *reprinted in* 1955 U.S. Code Cong. & Admin. News 2691, 2693. Moreover, as the dissent noted, Arizona's taxes also frustrate the achievement of the goals of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*

II. THE NINTH CIRCUIT HAS DEVELOPED AN APOSTATE "INDIAN PREEMPTION" DOCTRINE IN WHICH THE INVOLVEMENT OF NON-INDIANS IS BOTH THE DOMINANT CONSIDERATION AND INVARIABLY FATAL TO ANY CLAIM OF PREEMPTION.

This case is the capstone of an errant doctrine, under which the Ninth Circuit has distorted the preemption inquiry from a true balancing of government interests into a single-minded assessment of the degree of non-Indian involvement. This is logically circular, since the activity of non-Indians on reservations is what *occasions* the balancing of interests. Weighing the non-Indian involvement as part of the balancing process renders the law meaningless, because the answer is dictated by the very thing that gave rise to the question.

Because Indian tribes generally lack capital and business expertise, most reservation economic activity that is worth taxing involves non-Indians in some respect. In cases where Indian tribes rely on private capital or management, the preemption question should turn on whether the non-Indian involvement truly benefits the tribe and otherwise advances federal interests. In order to avoid these somewhat factual questions, however, the Arizona Attorney General's Office has persuaded the Ninth Circuit that the touchstone of the preemption inquiry is simply the extent of non-Indian involvement.

In *Salt River Pima-Maricopa Indian Community v. State of Arizona*, 50 F.3d 734 (9th Cir.), *cert. denied*, 116 S.Ct. 186 (1995), the Ninth Circuit held that Arizona could tax retail sales at a reservation shopping center. This result

was dictated by the generation-of-value analysis in *Colville*, but the Ninth Circuit registered a more general antipathy towards non-Indian activities on a reservation. In *Gila River Indian Community v. Waddell*, 91 F.3d 1232 (9th Cir. 1996), the Ninth Circuit upheld Arizona's taxes on concerts and boat races on a reservation, based on the degree of non-Indian involvement. The result may have been correct, since there was no showing that payment of the taxes burdened the tribe. The Ninth Circuit signaled, however, that non-Indian involvement was not only the central legal consideration, but also one that necessarily weighed in the state's favor.

The Ninth Circuit's "Indians only" doctrine arrives at the correct result when non-Indians are not advancing federal and tribal interests, but it rises from the errant to the pernicious when, as here, the non-Indian role vindicates federal policy. With this case, the Ninth Circuit has indicated that states can tax any reservation activity that involves non-Indians, even if that involvement is integral to genuine tribal economic development. In effect, the Ninth Circuit has rigged the balance of interests so it invariably favors the states. By definition, this doctrine applies only with respect to the taxation of non-Indians, so if the fact of non-Indian involvement controls the analysis, it is difficult to conceive of any case in which a state tax would be preempted. The Ninth Circuit's territory contains almost half the Native American population of the United States, so the consequences of its "Indians only" doctrine will extend far beyond those which normally attend the decision of a single circuit.

Moreover, the Ninth Circuit's decision contradicts the views of the Tenth Circuit (which has the second-largest

Native American population). In *Indian Country USA v. Oklahoma State Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), the Tenth Circuit held that a state could not impose a sales tax on bingo games that were managed by non-Indians. Far from concluding that the non-Indian role stigmatized the project, the Tenth Circuit held that the case for preemption was "particularly strong" when a tribe relies on the private sector in developing its tribal expertise. *Id.* at 986. The Ninth Circuit has created an inter-circuit split concerning a tribe's reliance on non-Indian resources.

The Ninth Circuit's view of Indian policy will have regrettable consequences. The other branches have encouraged non-Indian involvement because they have recognized that Indian tribes cannot jump-start their own economies. It is backwards to regard the catalyst for economic development as a reason why it can be taxed, and doing so will thwart the achievement of the federal goals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

YAVAPAI-PRESCOTT INDIAN TRIBE, Plaintiff-Appellee,

v.

Harold SCOTT, in his official capacity as Director of the Arizona Department of Revenue; Tony West, in his official capacity as Treasurer of the State of Arizona, Defendants-Cross-Defendants-Appellants,

v.

PRESCOTT CONVENTION CENTER, INC., an Arizona corporation, Defendant-Cross-Claimant-Appellee.

No. 96-16416.

United States Court of Appeals
Ninth Circuit.

Argued and Submitted May 7, 1997.

Decided June 30, 1997.

Yavapai-Prescott Indian Tribe brought action for declaratory relief and injunction against Director of Arizona Department of Revenue, Treasurer of State of Arizona, and private lessee of hotel on reservation, challenging assessment of business transaction privilege taxes on room rentals and food and beverage sales. The United States District Court for the District of Arizona, C.A. Muecke, J., granted injunctive relief. Director and Treasurer appealed. The Court of Appeals, Noonan, Circuit Judge, held that Arizona tax was not preempted.

Reversed and remanded with instructions.

Pregerson, Circuit Judge, filed dissenting opinion.

David Jeremy Bodney, Steptoe & Johnson, Phoenix, AZ, for plaintiff-appellee.

Patrick Irvine, Assistant Attorney General, Phoenix, AZ, for defendants-cross-defendants-appellants.

Cameron C. Artigue, Gammage & Burnham, Phoenix, AZ, for defendant-cross-claimant-appellee.

Appeal from the United States District Court for the District of Arizona; C.A. Muecke, District Judge, Presiding. D.C. No. CV-95-00124-CAM.

Before: PREGERSON, JOHN T. NOONAN, and KLEINFELD, Circuit Judges.

Opinion by Judge NOONAN; Dissent by Judge PREGERSON.

NOONAN, Circuit Judge:

Yavapai-Prescott Indian Tribe (the Tribe) brought this action for declaratory relief and an injunction against Harold Scott in his official capacity as Director of the Arizona Department of Revenue and Tony West in his official capacity as Treasurer of the State of Arizona (collectively, "the State" or "Arizona"). Prescott Convention Center, Inc., an Arizona corporation, (PCC) was also named as a defendant by the Tribe and became a cross-claimant against the State. From judgment in favor of the Tribe, the State appeals.

The case involves the judge-created law on the preemption of state taxes imposed on sales by non-Indians to non-Indians on an Indian reservation. Whether there is preemption depends on proof that the federal and tribal interest in the activity outweighs the interest of the State.

Holding that in this case the plaintiff Tribe has failed to establish the superior interest necessary for preemption, we reverse the judgment of the district court.

THE PARTIES AND THE PROPERTY

The Plaintiffs. The Tribe, an Indian tribe recognized by the United States, has currently 143 members, of whom 65 live on the Yavapai-Prescott Reservation (the Reservation) next to the City of Prescott, Arizona.

The State Defendants. These defendants are responsible for the collection of taxes for the State.

The Private Defendant-Cross-Claimant. PCC is the lessee of a hotel on the Reservation (the Hotel).

The Hotel. In 1983 the Tribe received a grant of $1.12 million from the United States Department of Housing and Urban Development for the construction of the Hotel. The Tribe entered into an agreement with PCC to build the Hotel and to lease it from the Tribe. To finance this construction the Tribe loaned $1.1 million of the grant money to PCC. The bulk of the money needed for construction, $8.5 million, was borrowed by PCC from the Tribe through bonds issued by the Industrial Development Authority of the City of Prescott and guaranteed by the Household Finance Corporation.

As part of the construction deal PCC also became the lessee of the Hotel. The lease provided both the terms of the Tribe's loan and the rent to be paid. In consideration of the loan, PCC agreed to pay 2 percent annually, plus 20 percent of the annual net cash flow, defined as all income less operating expenses, franchise fees, debt service, and

a replacement reserve; and in addition, on an assignment of the lease, the Tribe was entitled to 30 percent of the net proceeds of the assignment, defined as the gross proceeds less the outstanding balance on the mortgage and less "the equity" of PCC, defined as the cost of construction less sums borrowed. The rent was set as $35,000 per annum plus 1 percent of the gross revenue less taxes, telephone charges and franchise fees for the years of 1987 and 1988 and 1¼ percent thereafter. The Tribe was also entitled to levy a 1 percent transaction privilege tax on gross revenue and to increase this tax to an amount equivalent to the Arizona tax on similar businesses conducted outside the Reservation if the Arizona tax on the lessee's operations inside the Reservation was "declared unconstitutional, or deleted from the Arizona Revised Statutes, so that it no longer applies to Lessee's operations on the reservation."

Other pertinent terms were these: Title to all buildings and improvements vested immediately in the Tribe. PCC agreed to pay for all utilities and to maintain and repair all buildings. It was agreed that the Tribe should have no responsibility to provide or pay for police protection, fire protection, or street maintenance.

In 1985 the Secretary of the Interior approved the lease. The Hotel was built. It is a five-story structure with 161 rooms, half of them suites. (The suites, as more expensive, have presumably the better view, to the west over the city of Prescott.) The Hotel has a restaurant, an entertainment lounge, a salon, a health club, a pavilion in summer, and over 8,000 square feet of convention facilities including a ballroom and break-out rooms. The lounge has live entertainment five days a week. Food

service is a substantial part of the Hotel's business. On peak days the Hotel serves as many as 1,200 meals, using the ballroom and pavilion as well as the restaurant.

At its start, the Hotel obtained a franchise to operate as a Sheraton Hotel. On August 21, 1992 the Tribe subleased 2150 square feet of floor space from the Hotel in order to set up a gaming facility known as Bucky's at a rent of 25 percent of the gross receipts from gaming devices (slot machines and automated poker games). Since August 1992 the Hotel has been operated as part of the Grace Hospitality Group and known as the Prescott Resort and Conference Center.

PROCEEDINGS

The State issued an assessment for the business transaction privilege taxes collected by PCC on room rentals and food and beverage sales through December 31, 1990. On November 15, 1994 the Arizona Board of Tax Appeals affirmed the assessment. On January 12, 1995 the Board denied a motion for rehearing.

On January 23, 1995 the Tribe brought this action naming both the State and PCC as defendants. PCC filed a cross-complaint against the State. On April 25, 1996 the district court ruled on cross-motions for summary judgment. Carefully setting out the facts and relevant Supreme Court and Ninth Circuit precedent, the court held (1) that the legal incidence of the State taxes was not upon the Tribe and (2) that the federal and tribal interests in the activities taxed outweighed the State's, so that as a matter of federal law the State was preempted from exercising its taxing power upon the sales of the Hotel. On

June 13, 1996 the district court entered judgment enjoining the State from collecting the taxes and PCC from paying the taxes to the State.

The State appeals.

ANALYSIS

The Balance of Tribal, Federal and State Interests. The balancing required of a court determining whether taxation by the State is preempted has the ad hoc and particular character of a common law case developing common law based on the facts and like a common law decision must not do violence to precedent and must indeed fit within the frame established by precedent. In our case, three recent decisions of our court – *Gila River Indian Community v. Waddell,* 967 F.2d 1404 (9th Cir.1992) (per *Fletcher,* Nelson and Fernandez) (*Gila River I*); *Salt River Pima-Maricopa Indian Community v. State of Arizona,* 50 F.3d 734 (9th Cir.) (per *Fletcher,* Pregerson and Rymer), *cert. denied,* ___ U.S. ___, 116 S.Ct. 186, 133 L.Ed.2d 123 (1995) (*Salt River*); and *Gila River Indian Community v. Waddell,* 91 F.3d 1232 (9th Cir.1996) (per Reinhardt, Thompson and *O'Scannlain*) (*Gila River II*) – provide guidance within the context of the decisions of the United States Supreme Court which they reflect and interpret.

In *Gila River I,* the following alleged facts weighed in favor of preemption of Arizona business transaction privilege taxes laid on ticket sales to non-Indians for boat races and performances by two non-tribal lessees:

> 1. The income the Tribe received contributed to the economic well-being and self-sufficiency of the Tribe.

2. The United States held the fee to the property in trust for the Tribe.

3. The lake and marina on which the activities were conducted were constructed wholly with federal funds.

4. Any improvements belonged to the Tribe.

5. The several leases involved were all approved by the Secretary of the Interior as required by 25 U.S.C. § 415.

6. One lessee paid a sizable base rent plus a percentage of gross receipts in excess of $4 million to the Tribe.

7. The Tribe enforces regulations concerning sewage and sanitation.

8. A "significant number" of members of the Tribe were employed. *Gila River I*, 967 F.2d at 1406-1407.

9. The Tribe was actively involved in the production of the entertainment and worked "closely" with the lessees "to ensure that they provide high quality entertainment to the public." *Id.* at 1410.

In *Salt River*, the following facts weighed in favor of preemption of Arizona business transaction privilege taxes laid on sales to non-Indians by non-Indian lessees of a shopping mall:

1. The income received by the Tribe contributed to its economic well-being and self-sufficiency.

2. The United States held the fee in trust for individual tribal allottees on the reservation.

3. The improvements belonged to the tribal allottees.

4. The leases were subject to approval by the Secretary of the Interior.

5. The Tribe provided police protection.

6. The Tribe provided fire protection in conjunction with the city.

7. The Tribe conducted safety and health inspections.

8. The Tribe enforced the zoning laws.

9. The Tribe collected a 1 percent sales tax on gross sales amounting to over $1 million.

On the other hand, the following factors weighed in favor of the State in addition to the sales being made by non-Indians to non-Indians:

1. Almost all of the goods sold by the tenants were off-reservation goods.

2. The Tribe did not have any share as a lessor in the gross receipts.

3. The State provided the governmental services used by the non-Indians.

4. The State provided highway access. *Salt River,* 50 F.3d at 735.

In *Gila River II* the allegations made in *Gila River I* were tested by the evidence provided in the motion for summary judgment. Some of the same factors were found present, others were not. In particular, the federal funding of the facility, the approval of the leases by the Secretary of the Interior, the ownership of the fee, the Tribe's title to improvements were not disputed. *Gila*

River II, 91 F.3d at 1234-35. The Tribe's role in "providing clean and safe facilities" was acknowledged. *Id.* at 1238. On the other hand, the allegation that a "significant number" of the Tribe worked for the lessees did not hold up. *Id.* No more than six members of the Tribe had worked for one of the lessees. *Id.* The allegation as to the Tribe's share in the gross was found to be overblown. The lessees had never grossed $4 million, so the Tribe had never shared in their receipts. Moreover, it was found that the State provided police protection and traffic control; that the State exercised concurrent jurisdiction with the Tribe as to liquor sales; that the State provided a forum for civil and criminal litigation arising on the reservation between non-Indians; and that the Tribe's control over events consisted only in the ability to shut down a scheduled event on the ground of public safety. *Id.* at 1238-39.

In *Gila River I* the court held that the allegations set out a claim for preemption that could not be dismissed on its face. *Gila River I*, 967 F.3d at 1413. In *Salt River* the court ruled that summary judgment was properly granted in favor of the State, observing that the Tribe "contributes relatively little to the value of the products and services sold at the mall; the businesses are managed and owned by non-Indians and the [Tribe] does not participate in business decisions and does not share in the profits." *Salt River*, 50 F.3d at 738. Even more significantly, the court stated: "When taxes are imposed on the sale of non-Indian products to non-Indians, as is the case here and in the so-called 'smoke shop' cases, the preemption balance tips toward state interests." *Id.* at 737.

Gila River II was decided in the light of *Gila River I* and *Salt River.* We held that summary judgment was properly granted to the State, declaring that the case was "controlled" by *Salt River. Gila River II,* 91 F.3d at 1236. *Salt River* had distinguished *Gila River I* as a case where the Tribe had "maintained an active role in the business enterprise by developing and marketing on-reservation entertainment to the general public." *Salt River,* 50 F.3d at 738. When the evidence in *Gila River II* failed to sustain this allegation of "an active role", the preemption case of the Gila River Tribe looked like the lost case of the Salt River Tribe. Moreover, the court added, the State's services justified its tax on those benefitting from them. *Gila River II,* 91 F.3d at 1238-39.

Besides the differences in the facts as alleged and as found on the second round, the legal standards employed were nuanced and refined. In *Gila River I* the approval of the leases by the Secretary of the Interior was given substantial weight as comparable to the comprehensive federal regulation of the harvesting of timber that had led to preemption in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 145-6, 100 S.Ct. 2578, 2584-85, 65 L.Ed.2d 665 (1980) (see *Gila River I,* 967 F.2d at 1411). In *Salt River* and *Gila River II* the Secretary's regulation of the leases was accorded little weight. Again, in *Gila River I* the point was made that "where strong federal and tribal interests exist" the State's taxes had to be "narrowly tailored" to funding the services that the State provided in connection with the activities taking place on the reservation. *Gila River I,* 967 F.2d at 1412. In *Salt River* the relation between the state taxes and the services provided was not emphasized at all, presumably because the federal and tribal

interest was not thought to be strong. It was also noted that there was no requirement that a state tax on reservation activities "must be proportionate to the services provided to the Indians." *Salt River,* 50 F.3d at 737. In *Gila River II* the latter statement was repeated as dispositive of the Tribe's objection that the taxes were not narrowly tailored. *Gila River II* 91 F.3d at 1239. It is evident that once a requirement of proportion between state services and state tax is not the criterion, the requirement of narrow tailoring is elusive and its appropriateness remains dependent on the strength of the tribal and federal interest found to exist.

In our case the following facts favor preemption:

1. The fee is held by the United States in trust for the Tribe.

2. The Tribe has furnished the site for the Hotel.

3. The Tribe has ownership of the Hotel, its facilities, and all improvements.

4. The Tribe has a residual interest in the assignment of the lease.

5. The Tribe, with the help of the federal government, furnished approximately 11 percent of the construction cost of the Hotel.

6. Since 1992 the Tribe has operated on the premises of the Hotel slot machines and automated poker games which attract some patrons to the Hotel.

7. The income from the lease contributes to the economic well-being and self-sufficiency of the Tribe.

8. The Secretary of the Interior has approved the leases involved.

Factors weighing against preemption are the following:

1. There is no evidence of employment by the Hotel of any members of the Tribe. The district court said that the record was not clear on this point. It was the Tribe's burden to provide evidence of tribal employment if there was any. PCC had agreed to prefer tribal members in hiring. The Hotel employs between 150 and 200 persons. The manager of the Hotel was not aware of any employee from the Tribe.

2. The bulk of the funding for the Hotel came from non-tribal and non-federal sources.

3. The tribal contribution to the quality of the food served at the Hotel is minimal – an inspection two or three times a year.

4. The Tribe receives only a guaranteed 1¼ percent of the Hotel's gross revenues. The record does not reveal what it has received in terms of the 20 percent of net revenues. As the Tribe's expert Joseph Kalt stated, this return is "subject to capital recapture provisions."

5. The Tribe does not have an active role in the business of the Hotel.

6. The State provides these services to the Hotel:

(a) The criminal law governing the operation of the Hotel, such as the statutes on fraud, on checks and credit cards, and on embezzlement. *See, e.g.,* A.R.S. § 13-2310 (fraudulent schemes and artifices).

(b) The law governing liens, *Red Mountain Machinery Co. v. Grace Investment Co.*, 29 F.3d 1408, (9th Cir.), *cert. denied*, 513 U.S. 1044, 115 S.Ct. 639, 130 L.Ed.2d 545 (1994), and other security instruments such as the mortgages by which the Hotel is financed.

(c) The law governing employment at the Hotel, including the workman's compensation law specifically referenced by the lease.

In the light of these facts, we address preemption. The Hotel keeps separate accounts for food and beverage sales and the State tax on them and room sales and the State tax on them. We examine these sales separately. On balance, the Tribe contributes virtually nothing to the food and beverage sales of the Hotel. In this respect the case is no different from *Salt River* where two of the lessees were Taco Bell and Kentucky Fried Chicken and almost all of the goods sold were non-reservation goods. *Salt River*, 50 F.3d at 735. The distinction is suggested that a hotel restaurant has to take more care in the preparation of its food than a fast food outlet. The distinction exists, but it is irrelevant. The fact that more time is taken in the kitchen of the Hotel than at Taco Bell does not mean that the Tribe contributes more to the value of what is sold; the food preparation is done by PCC, not the Tribe. The beverages, of course, must be entirely brought in from outside. Approximately 1.5 percent of the food and beverage sales is from Bucky's; the amount is de minimis. There is, consequently, no basis on which it could be found that the substantial receipts generated by the

Hotel's food and beverage service owe anything to the Tribe. There can be no preemption as to them.

A closer case is presented by the room receipts. *Salt River* and *Gila River II* both teach that the Tribe must have "an active role" in the creation of the value taxed in order to establish preemption. A distinction, however, may be urged where the business in question is that of a hotel. The value of the business of this Hotel is generated in part by its location; in part by its physical attraction; in part by its facilities including its lounge, exercise areas, and, it may be, gaming area; in part by the skill of its management in welcoming and cultivating its guests and maintaining its facilities; and in part by its franchised name. The Tribe argues that it provided the location, part of the funding for the structure and facilities, and the gaming. The difficulty with this argument is that the record does not permit a determination as to how much of the value arises from the Tribe's contribution.

The burden of proof was on the plaintiff Tribe. The Tribe moved for summary judgment on the record before the court, as did the State. When the parties have agreed that the facts are sufficient to decide the case, the party with the burden of proof must lose if it has failed to present enough facts to sustain its case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Such is the Tribe's position as to the room receipts of the Hotel. Accordingly, even if the Tribe's non-active role in relation to the Hotel were treated as important, insufficient evidence exists on this record to tip the balance in the Tribe's favor.

A straightforward application of our trilogy of cases confirms the conclusion reached by looking at the food and beverage sales and the room receipts separately. All the sales are by non-Indians to non-Indians. There is no tribal employment. There is no active tribal participation in the business. The State provides substantial governmental services to the business taxed. These four factors were decisive in *Salt River* and *Gila River II*. The ownership of the fee, the regulation of the leases by the Secretary of the Interior, minor tribal regulatory acts, and the impact of State taxation on tribal income were not enough to outweigh them. They fail to do so here.

The Legal Incidence Of The Taxes. The district court determined on the basis of the taxing statutes and an Arizona case addressing the question found that the legal incidence of the taxes fell on the seller of the services. A.R.S. § 42-1306; *J.C. Penney Co. v. Arizona Dep't of Revenue*, 125 Ariz. 469, 472, 610 P.2d 471, 474 (Ct.App.1980); *Tower Plaza Investments, Ltd. v. DeWitt*, 109 Ariz. 248, 250, 508 P.2d 324, 326 (1973). The seller of the Hotel's rooms, food, and beverages is PCC. The district court correctly concluded that PCC bore the legal incidence of the taxes.

On this appeal, as a way of sustaining the district court's judgment in its favor, the Tribe argues that it shares the legal incidence because of its arrangement with PCC whereby the Tribe gets part of the Hotel revenues and has a 30 percent interest in a net portion of the price if the Hotel is sold. The Tribe contends that with PCC it forms a "group or combination acting as a unit," which A.R.S. § 42-1301(8) defines as a "person" upon whom the taxes may fall. The Tribe bolsters its case by the affidavit of its expert Joseph Kalt that "the Tribe has

an ownership position in the economic entity that functions as the seller."

The Tribe's argument is unavailing. Taxation, the Supreme Court has informed us, is "an intensely practical matter." *Farmers' Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204, 212, 50 S.Ct. 98, 100, 74 L.Ed. 371 (1930). Yet it is not so practical a matter that legal lines can be disregarded. Stockholders form a group with their corporation and bear the economic incidence of a tax upon it. The legal incidence of the tax, nonetheless, falls upon the corporation. Any landlord with a percentage lease cutting him into a share of his tenant's business bears the economic incidence of a sales tax on the tenant's business; the tenant remains the party legally liable. If the landlord had a partial and remote economic interest in the sale of the tenant's business it would not alter the legal impact now of taxes levied on the tenant's sales. The Tribe is a landlord, not liable for the taxes. As the district court noted, *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) is dispositive in rejecting an economic approach to the incidence of taxation and insisting that legal incidence is the proper test. The courts have been firmly instructed to avoid the "daunting" inquiry into economic incidence. *Id.* at ___, 115 S.Ct. at 2221.

The Tribe does not improve its case by citing with emphasis the *J.C. Penney* court's statement that in the case of a lease the Arizona tax falls on the landlord. If the imposition of taxes on the lease were at issue, then the legal incidence of the tax would be on the Tribe as landlord. In this case, the tax is imposed on the sale of rooms,

beverages and food, not leases. Therefore, the legal incidence of the taxes is on the seller, PCC, of the items taxed. *See J.C. Penney*, 125 Ariz. at 472, 610 P.2d 471 (per O'Connor, J.).

REVERSED and REMANDED with instructions to enter judgment for the State.

PREGERSON, Circuit Judge, dissenting:

The district court concluded that the balance of tribal, federal, and state interests in this case tips in favor of the Tribe and granted the Tribe's summary judgment motion. In doing so, the district court considered the Tribe's strong interest in economic development – a particularly weighty concern for a small and destitute 143-member Tribe.

The district court also properly considered the long-standing federal interest of promoting tribal sovereignty. Further, the district court noted the special relationship that exists between the Tribe and the federal government. That relationship included federal regulation of Indian gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721. Finally, the district court also noted that the Tribe received a $1.12 million Development Grant from the Department of Housing and Urban Development ("HUD"). This grant was used for economic development on the Reservation.

Because the district court correctly found that the balance of interests tips in favor of the Tribe, I submit that the majority is wrong in concluding that federal law does not preempt Arizona's privilege tax.

I.

"The standard preemption analysis is inapplicable to cases involving Indian law." *Gila River Indian Community v. Waddell* ("*Gila River II*"), 91 F.3d 1232, 1236 (9th Cir.1996). In the Indian law context, state law is preempted if the balance of tribal, federal, and state interests tips in favor of preemption. *Id.* Traditional notions of Indian sovereignty and the federal goal of promoting tribal self-government provide a crucial "backdrop" for the preemption analysis. *Id.* This "backdrop" requirement requires that treaties and federal statutes be interpreted generously to comport with traditional notions of sovereignty and with the federal policy of encouraging tribal independence. *Id.* at 1236.

II.

A tribe that plays an active role in *generating activities of value* on its reservation has a strong interest in maintaining those activities free from state interference. *Cabazon Band of Mission Indians v. Wilson* ("*Cabazon v. Wilson*"), 37 F.3d 430, 434-35 (9th Cir.1994) (citing *Gila River Indian Community v. Waddell* ("*Gila River I*"), 967 F.2d 1404, 1410 (9th Cir.1992)). In this case, the Tribe has provided substantial evidence that it plays an active role in generating activities of value on its Reservation.

The Tribe generates value by operating a casino within the Hotel. This case is substantially similar to *California v. Cabazon Band of Mission Indians* ("*California v. Cabazon*"), 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), and *Cabazon v. Wilson*, 37 F.3d 430 (9th Cir.1994) –

two cases finding state regulation of on-reservation gaming activities preempted by federal law.

In *California v. Cabazon*, two tribes conducted on-reservation bingo games. 480 U.S. at 204-05, 107 S.Ct. at 1085-86. The Supreme Court found that an important tribal interest existed because the tribes "built modern facilities which provide recreational opportunities and ancillary services to their patrons. . . . " *Id.* at 219, 107 S.Ct. at 1093. The two tribes were "generating value on the reservations through activities in which they have a substantial interest." *Id.* at 220, 107 S.Ct. at 1093.

Similarly, in *Cabazon v. Wilson*, we found that a state tax on simulcast wagering-off-track betting-at a facility located on the reservation was preempted by federal law. 37 F.3d at 435. We noted that the tribes "have invested significant funds and effort to construct and to operate wagering facilities and to attract patrons." *Id.* We stated: "It is sufficient that the [tribes] have made a substantial investment in the gaming operations and are not merely serving as a conduit for the products of others." *Id.*

As was true in *California v. Cabazon*, and *Cabazon v. Wilson*, the Tribe in this case has a substantial interest in the Hotel and the casino. The Tribe made a $1.1 million dollar investment in the Hotel.[1] In return, the Tribe is entitled to receive twenty percent of net operating revenues (excluding taxes paid to the State) and thirty percent

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[1] The $1.12 million HUD Development Grant required the Tribe to loan $1.1 million to the Hotel's developer. The remaining $20,000 was used to pay the Hotel's administration costs.

of the proceeds of any transfer of the leasehold interest of Prescott Convention Center ("PCC"). The Tribe also owns the Hotel's physical structure and improvements and leases the property to PCC. PCC, in turn, leased portions of the Hotel to the Tribe for the purpose of operating the casino.

The Tribe's interest in the Hotel and casino are one and the same because the Hotel and the casino are closely interrelated. The Hotel advertises the casino to attract customers both for lodging and for meals. The Hotel's promotional materials identify the Hotel as the "Prescott Resort Conference Center *and Casino*." Furthermore, many of the Hotel's patrons spend extended periods of time on the Reservation and participate in the Tribe's casino.[2]

Given the Tribe's small size – the Tribe currently has 143 members, of whom approximately sixty-five live on the Reservation – the Tribe's interest in the Hotel's operations is even more compelling. Without the coordinated efforts of outside developers it would be difficult, if not impossible, for the Tribe to engage in any meaningful economic development.

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[2] The majority faults the Tribe for failing to provide a specific "determination as to how much of the value arises from the Tribe's contribution." Majority Op. at 7551. This standard creates a nearly insurmountable burden on the Tribe. The Tribe has demonstrated that the casino and the Hotel are interrelated. This is sufficient to demonstrate that the Tribe's activities "generate value" regardless of the determination of an exact dollar amount.

As stated above, HUD awarded the Tribe a $1.12 million Development Grant. In doing so, HUD specifically found that constructing and operating the Hotel would encourage the Tribe's economic development. The Development Grant required that the Tribe *and a non-Indian developer* obtain additional financing. By joining with a non-Indian developer to construct the Hotel, the Tribe has promoted its economic development beyond what it could achieve through its own efforts.[3]

The Tribe has demonstrated a strong interest in the Hotel's operations through its concerted and sustained efforts to develop and manage its resources – the commercial value of its land.[4]

III.

This case implicates two federal interests: (1) tribal economic development and (2) comprehensive federal

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[3] The majority notes that the record does not reflect that the Hotel employs any members of the Tribe. That fact, however, does not render the Tribe's interest in the Hotel insignificant. The Tribe is not limited to economic development solely through increased employment opportunities.

[4] The Tribe's most significant interests in this case relate to generating value in the Hotel's operations and economic development. Nonetheless, the majority acknowledges several other tribal interests including: (1) the Hotel's location on the reservation; (2) the Tribe's ownership of the Hotel, its facilities, and all improvements; (3) the Tribe's residual interest in the assignment of the lease; and (4) the Tribe's contribution of approximately 11% of the Hotel's construction cost. In combination, these factors also compel the finding that the Tribe has a strong interest in the Hotel's operations.

regulatory schemes that include (a) leasing trust lands, (b) the Indian Gaming Regulatory Act ("IGRA"), and (c) the $1.12 million HUD Development Grant.

A. Tribal Economic Development

"The promotion of tribal economic development has long been recognized as an important federal interest." *Gila River II*, 91 F.3d at 1237; *see also California v. Cabazon*, 480 U.S. at 217 n. 20, 107 S.Ct. at 1093 n. 20 ("It is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government.") (quoting 19 Weekly Comp. Pres. Doc. 96, 99 (Jan. 24, 1983)); 30 Weekly Comp. Pres. Doc. 941, 943 (Apr. 29, 1994) (discussing the need for "special incentives to invest in reservations" and to "develop capital for new businesses on reservations"). The Supreme Court, however, has rejected the federal interest in tribal economic development as an overriding force preempting an otherwise valid state tax on non-Indian activity. *Gila River II*, 91 F.3d at 1237 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980)). Thus, a federal interest "in assisting tribes in their efforts to achieve economic self-sufficiency . . . does not, *without more*, defeat a state tax on non-Indians." *Salt River Pima-Maricopa Indian Community v. Arizona*, 50 F.3d 734, 739 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 186, 133 L.Ed.2d 123 (1995) (emphasis added). In this case, however, something "more" exists – the Tribe's casino.

B. Comprehensive Federal Regulatory Schemes

Three federal regulatory schemes also support the conclusion that a strong federal interest exists in this case.

The federal statutes authorizing the lease of trust lands and the regulations governing such leasing constitute one comprehensive federal scheme. *See, e.g.*, 25 U.S.C. § 415; 25 C.F.R. § 162 (requiring the approval of the Secretary of the Interior for leases). In *Gila River II*, however, we found that the regulatory scheme governing leases was "insufficient to preempt a state tax imposed on non-Indians for transactions with other non-Indians." *Id.* at 1237. But this case, unlike *Gila River II*, implicates two additional federal regulatory schemes – IGRA and the $1.12 million HUD Development Grant.

Federal law regulating Indian gaming constitutes a comprehensive federal regulatory scheme. The Tribe exercises exclusive control over the casino. The federal government regulates the operation of Indian gaming under IGRA, 25 U.S.C. §§ 2701-2721. IGRA clearly addresses the federal interest in regulating Indian gaming: "Intended to 'promot[e] tribal economic development, self-sufficiency, and strong tribal governments,' IGRA seeks to 'ensure that the Indian tribe is the *primary beneficiary* of the gaming operation.' " *Cabazon v. Wilson*, 37 F.3d at 433 (alterations in original) (citing 25 U.S.C. § 2701(1), (2)).

Moreover, to foster economic development, the Tribe applied for and received a $1.12 million HUD Development Grant. A comprehensive federal scheme regulates HUD's Development Grants. *See* 24 C.F.R. § 570.450. Such

grants are designed to stimulate economic development necessary for economic recovery.

The federal policy supporting tribal economic development, the Tribe's involvement in the casino, the federal regulatory scheme governing leases of trust lands, IGRA, and the $1.12 million HUD Development Grant, all compel the conclusion that strong federal interests exist.

IV.

State interests are strongest "when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10 (1980).

In *Gila River II*, we found that the state involvement on the reservation constituted a sufficient state interest to justify a state tax on entertainment events. 91 F.3d at 1239. In that case, the Tribe developed a motor and aquatic raceway for sporting events, and an amphitheater for the performing arts on its reservation. *Id.* at 1235. The court noted that the state provided "a number of governmental functions critical to the success" of the entertainment events. *Id.* at 1238.

In *Salt River*, we upheld a state tax on non-Indian businesses selling products and services to other non-Indians at a shopping mall located on the tribe's reservation. *Salt River* concluded that "Arizona and its agents provide the *majority* of the governmental services. . . ." *Id.* at 737 (emphasis added).

Unlike *Gila River II* and *Salt River,* in this case the state does not provide the overwhelming "majority" of services and does not provide services "critical" to the Hotel's success. In fact, the State is reimbursed for most of the services that it provides to the Reservation. When a tribe reimburses the State for the services provided by the State, the State's interest is weak. *Cabazon v. Wilson,* 37 F.3d at 435.

The Tribe pays the Yavapai County Sheriff for law enforcement services. The Tribe also pays the Central Yavapai Fire District for fire protection and emergency medical services to the Reservation. Although the Arizona Department of Transportation installed and maintains two traffic lights near the Hotel, the Bureau of Indian Affairs reimbursed the State for one-half the construction cost of the traffic lights and the Tribe pays for the electricity. The only services that Arizona provides at its own expense are educational services for the Tribe's children, health services to Tribe members, and liquor licensing to the Hotel.[5]

V.

There is no requirement that a "tax imposed on non-Indians for reservation activities be *proportional* to the services provided by the State. . . . " *Gila River II,* 91 F.3d

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[5] The majority indicates that the State provides the Hotel with the following services: criminal law governing the Hotel's operation; the law governing liens; and the law governing worker's compensation. Majority Op. at 7549-50. Each of these state interests, however, are merely incidental and not "critical to the success" of the Hotel.

at 1239 (emphasis added) (citing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 185 n. 15, 109 S.Ct. 1698, 1713 n. 15, 104 L.Ed.2d 209 (1989)). Nevertheless, "this court has required that the State demonstrate a *close relationship* between the tax imposed on the on-reservation activity and the state interest asserted to justify such tax." *Cabazon v. Wilson*, 37 F.3d at 435 (emphasis added).

Defendants Scott and West admit that no portion of the privilege tax is segregated for tribal purposes. Because the privilege tax does not fund services related to the Hotel's operations or the Reservation, there can be no "close relationship" between the privilege tax and the services provided by the State. *See Cabazon v. Wilson*, 37 F.3d at 435 (concluding that tax was not narrowly tailored because one hundred percent of it went to the state's general fund).

In sum, the Tribe has provided compelling evidence that it has a strong interest in the Hotel's operations because it is involved in "generating activities of value" by operating a casino within the Hotel. Strong federal interests exist through the federal regulation of Indian gaming, the lease of trust lands, the $1.12 million HUD Development Grant, and the federal policy of promoting tribal economic development. These strong tribal and federal interests outweigh the State's weak interest because the State is reimbursed for most of the services that it provides to the Tribe.

For the reasons set forth above, I would affirm the district court's decision

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

YAVAPAI-PRESCOTT INDIAN TRIBE, Plaintiff, vs. HAROLD SCOTT, et al., Defendants.	No. CIV 95-124 PCT CAM MEMORANDUM and ORDER (Filed Apr. 25, 1996)

Having considered the pleadings filed concerning defendant West's motion to dismiss, Prescott Convention Center's motion for summary judgment, Yavapai-Prescott Indian Tribe's motion for summary judgment, and West's motion for summary judgment, the Court concludes as follows:

INTRODUCTION

Plaintiff Yavapai-Prescott Indian Tribe (the "Tribe") filed a verified complaint seeking declaratory and injunctive relief to prevent defendant Harold Scott ("Scott") and defendant Tony West ("West") on behalf of the State of Arizona from levying, collecting or assessing taxes against defendant Prescott Convention Center, Inc. ("PCC"). In essence, the lawsuit concern whether the State of Arizona can impose its transaction privilege tax on the operations of the PCC.

The Tribe entered into agreements with private lenders and developers to construct a hotel and conference center on its Reservation. The hotel is situated on Reservation land held in trust for the Tribe by the federal government. The Tribe entered into a lease agreement with PCC for the operation of the hotel. The lease entitled the Tribe to (1) an annual base rent, (2) 1% of the Hotel's gross receipts, (3) percentage rent payments in the amount of 20% of net operating revenues (excluding taxes paid to the State), (4) 30% of the proceeds of any transfer of PCC's leasehold interest, (5) preferential hiring of tribal members, and (6) authority to approve or disapprove any sublease by PCC. The lease also permits the Tribe to impose a 1% sales tax on the hotel operations.

Defendants Scott and West on behalf of the State assessed a transaction privilege tax on the rental of rooms and the sale of food at the hotel through December 31, 1990. The Tribe claims that the revenue from the transaction privilege taxes is used for off-reservation property taxes and provision of services. The Tribe also claims that it is indirectly paying these taxes because it cannot collect the same taxes from PCC under the terms of the lease, which prevents the Tribe from "raising and collecting additional tax on these receipts if PCC is required to pay the same taxes to the State of Arizona."

I. PCC's MOTION TO DISMISS

A. Standard of Review

A complaint may be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure only if "it appears beyond doubt that the plaintiff can prove no set of facts

in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 511 (1980); *Alonzo v. ACF Property Management, Inc.*, 643 F.2d 578, 579 (9th Cir. 1981); *Hunt-Wesson Foods, Inc. v. Ragu Foods*, 627 F.2d 919, 924 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369 (1981). The complaint is construed in the light most favorable to plaintiff, all factual allegations are presumed to be true and all reasonable inferences are made in favor of the non-moving party. *Miree v. DeKalb County, Georgia*, 433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 2492 n. 2 (1977); *Western Mining Council v. Wat*, 643 F.2d 618 (9th Cir.), *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567 (1981); *Mann v. Adams Realty Co.*, 556 F.2d 288, 293 (5th Cir. 1977). However, legal conclusions couched as factual allegations are not given a presumption of truthfulness. *See Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649-650 (9th Cir. 1984). A complaint that lacks an allegation regarding a required element necessary to obtain relief may be dismissed. *See Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553 (7th Cir. 1980).

B. Discussion

PCC filed a crossclaim against defendants Scott and West seeking relief on two grounds: (1) that the tax on the hotel operations is preempted by federal law and (2) that the state has singled out PCC for different and disparate treatment through selective enforcement of Arizona's tax laws and that other similarly situated hotels on Indian reservations are not required to pay and are not paying

state taxes. PCC alleges that this disparate treatment violates its rights to equal protection under the Fourteenth Amendment and Article II, section 13 of the Arizona Constitution.

Scott and West ("defendants" for purposes of this motion) argue that the crossclaim should be dismissed because PCC is not entitled to relief on the same or similar grounds as the Tribe. The Tribe is authorized to bring suit under 28 U.S.C. § 1362. Indian tribes can bring actions in federal court to the same extent that the United States acting on their behalf could do. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976). Indian Tribes are permitted to seek declaratory and injunctive relief against state officials due to the anti-injunction statutes, 28 U.S.C. § 1341.

PCC asserts that jurisdiction is appropriate under 28 U.S.C. § 1367, which permits supplemental jurisdiction over claims that are so related to claims in an action within the original jurisdiction of the court that they form part of the same case for controversy under Article III. Defendants argue that § 1367(a) is limited "as expressly provided otherwise by statute," i.e., the anti-injunction provisions of 28 U.S.C. § 1341.

This court has jurisdiction over this crossclaim because it is part of the same controversy, even it could not have been asserted as an original claim. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 617, n. 14 (1966). The Ninth Circuit has determined that related claims can be brought in an action originally brought by an Indian tribe under 28 U.S.C. § 1362, which permits supplemental jurisdiction. *Hoopla Valley Tribe v. Nevins,*

881 F.2d 657 (9th Cir. 1989). This is true even with the jurisdictional bar imposed by 28 U.S.C. § 1341 because this crossclaim is one of the situations that is the exception to the anti-injunction statute. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

The crossclaim arises from the same common nucleus of operative facts. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Both the complaint and the crossclaim arise from a common set of facts involving PCC's tax liability and the taxation of the Hotel on the Reservation. Thus, both the complaint and cross claim arise out of the taxation transactions and the lease agreement with the Tribe and the Hotel.

Additionally, PCC's equal protection theory does not undermine the determination that the scope of the controversy is governed by a common factual nucleus. It would be unreasonable and a waste of the court's and the parties' resources to split this cause of action. This Court finds no basis for piecemeal litigation.

II. MOTIONS FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment may be granted if the movant shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. Summary judgment is proper if the nonmoving party fails to make a showing sufficient to establish the existence of an essential element of his case on which he will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 106 S.Ct. 2548, 2552, 91 L.Ed.2d

265 (1986). The disputed fact(s) must be material. *Id.* Substantive law determines which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Moreover, the dispute must be genuine. A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Liberty Lobby,* 477 U.S. at 249, 106 S.Ct. at 2510. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Liberty Lobby,* 477 U.S. at 249-50, 106 S.Ct. at 2510-11. In a civil case, the question is:

> whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Liberty Lobby, 477 U.S. at 252, 106 S.Ct. at 2512.

B. Facts

The following facts are undisputed:

Plaintiff is a tribe of Yavapai Indians recognized by the United States Secretary of the Interior. DSOF, 53; Complaint, 3. The Tribe currently has 143 members. DSOF, 56.

The Yavapai-Prescott Reservation is located next to the City of Prescott, Arizona, DSOF, 36. The United States holds fee title to the reservation land in trust for the Yavapai-Prescott Indian Tribe. DSOF, 39. The 1990 Census determined that the Reservation had a population of 193, of whom 151 were American Indian, 24 were white, and 18 were other races. DSOF, 42. In 1995, the Tribal Vice President estimated that 65 tribal members live on the Reservation.

In cooperation with the United States government and private developers, the Tribe has successfully planned, executed and regulated a development strategy that has resulted in the construction and operation of the Prescott Resort and convention Center (the "Hotel"). Plaintiffs' Statement of Facts ("PSOF"), 1. Prior to May 1, 1994, the Hotel was known as the Sheraton Prescott Resort and Conference Center. Defendants' Statement of Facts ("DSOF"), 1.

The Hotel is a combination hotel and resort with a casino. DSOF, 2. Many of the Hotel patrons spend extended periods of time on the Reservation and partaking of the Hotel's tribal gaming. PSOF, 3-4. The Hotel's advertisement for packages states that tax and gratuities are not included. DSOF, 16. The tax or privilege charge billed to room guests is separately stated on the bill of the rooms. DSOF, 17. When guests check out of the Hotel, the room charges on the guest folio are accompanied by an item labeled "privilege charge," to reflect the tax that State alleges is due from PCC. DSOF, 18. The "privilege charge" also is shown for other purchases at the Hotel.

The Reservations' economic development, including the Hotel, serves as a community center that, as a consequence of the Tribe's careful design, planning and regulation, attracts members of the community and other visitors to come to the Reservation and remain for extended periods of time to take advantage of the combination of services and lodging that the Tribe has created. PSOF, 2. The success of the Hotel is directly related to the unique characteristics of the Reservation and its land as well as other activities such as Tribal managed gaming. PSOF, 3-4.

To finance construction of the Hotel, the Tribe sought and obtained federal and private assistance. PSOF, 5. The Tribe applied to the United States Department of Housing and Urban Development ("HUD") for an Urban Development Action Grant ("UDAG"), which are designed "to help stimulate economic development activity needed in aid in economic recovery," and are governed by a comprehensive federal regulatory scheme. 24 C.F.R. §570.450. Upon consideration of the Tribe's application, HUD specifically found the construction and operation of the Hotel to be a desirable and effective means to promote the fundamental federal policy of encouraging tribal economic development, and awarded the Tribe a grant in the amount of $1,120,000 for that purpose. PSOF, 6. In connection with the UDAG grant, the federal government required the Tribe and a non-Indian developer to secure additional financing to cover the remainder of the cost of the remainder of the cost of the Hotel's construction. PSOF, 7.

The Tribe received a grant from HUD for $1,120,000. DSOF, 79. The Tribe loaned approximately $1,100,000 to

PCC for the construction of the Hotel.[1] *Id.* The loan is for 25 years and provides for monthly payments of interests at a rate of 2% per annum, with the principal amount of the loan due at the end for the 25 year period. The loan is secured by a second deed of trust on the leasehold interest of PCC in the land, improvements and equipment used in connection with the hotel. Additionally, the Tribe obtained $8,500,000 through the issuance of the City of Prescott Industrial Development bonds, sponsored by the Industrial Development Authority of the City of Prescott. DSOF, 81.

No state or municipal funds were used to finance the construction of the Hotel. Plaintiff's Statement of Disputed Facts, 5. PCC is a subsidiary of W.M. Grace Co.'s, Inc. DSOF, 31. Neither PCC nor W.M. Grace Co.'s, Inc. is owned by a member of the Yavapai-Prescott Indian Tribe, or a member of any recognized Indian Tribe. DSOF, 33.

As required by the federal UDAG agreement, in 1983, the Tribe entered into a lease agreement (the "Lease") with PCC for the purpose of financing and constructing the Hotel. PSOF, 8. Under the terms of the Lease, PCC received a leasehold interest in the Hotel and certain Reservation land for a fixed term of 65 years, beginning January 2, 1987 and extending to January 1, 2051. PSOF, 8. Title to the improvements and fixtures comprising the Hotel is vested entirely in the Tribe. PSOF, 9. Shortly after execution of the Lease, the Secretary of the Interior

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[1] The terms of the Grant required the Tribe to loan $1,1000,000 of the money to the Developer of the Hotel. DSOF, 80. The remaining 420,000 [sic; should be $20,000] would be used for payment of administration costs of the Hotel. DSOF, 80.

approved the Lease as required by the comprehensive federal regulatory scheme governing the leasing of tribal lands. 25 U.S.C. §415. PSOF, 10. The Secretary of the Interior also approved amendments to the Lease in 1985. PSOF, 10.

The UDAG loan bears interest at only two percent (2%) per annum and is expressly subordinated to the primary financing for the Hotel. PSOF, 11. The Tribe realizes a negative real-dollar return on its loan to PCC, and the loan has economic value to the Tribe only to the extent the Tribe profits from its status related to the enterprise that operates the Hotel[2]. PSOF, 11.

The Tribe imposes a one percent (1%) tax on the Hotel's gross receipts from room rentals and sales of food and beverages. PSOF, 12. Food and beverage sales are an integral part of the Hotel's business and account for approximately half of the Hotel's total revenues. PSOF, 12. The food served at the Hotel is prepared on the Reservation under Tribal health and quality standards, and is a product of the Reservation. PSOF, 12.

The Yavapai County Sheriffs office provides the law enforcement services for non-Indians and Indians on the Reservation. DSOF, 92. The Tribe has entered into a contract with the BIA for funds to provide the law enforcement services on the Reservation. DSOF, 96. Prior to the

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[2] Sixty-four other businesses are located on the Reservation as tenants of the Tribe, most of them at Frontier Village. PSOF, 50. Frontier Village was developed by the Grace companies. The Tribe receives rental income from properties based in part on sales revenue from the leased property. PSOF, 52.

agreement, Yavapai County Sheriff exercised jurisdiction over non-Indians at the hotel.

The Tribe and the City of Prescott have an agreement for the City to provide water and sewer service on the Reservation. DSOF, 97. The Central Yavapai Fire District provides fire and emergency medical service to the Reservation and the Hotel pursuant to an agreement with the Tribe. DSOF, 99. PCC makes payments to the Tribe for this service. DSOF, 100.

The Arizona Department of Transportation maintains the roads leading to the Hotel, in particular State Route 69. DSOF, 101-103. The ADOT has spent $117,000 on the installation of two traffic lights near the Hotel. The ADOT provides the maintenance of the two lights, however the BIA reimbursed the State for one-half of the construction costs of the traffic lights, and the Tribe pays for the electricity DSOF, 103-104.

The Tribe conducts comprehensive food service inspections at the Hotel, and enforces the standards contained in the 1993 FDA Food Code. PSOF, 14. The Tribe is the only entity in Arizona that has adopted the 1993 standards. PSOF, 14.

In cooperation with the Indian Health Services, the Tribe conducts an annual comprehensive health survey of the entire Hotel. PSOF, 15. The Tribe monitors compliance with the Americans with Disabilities Act. PSOF, 15. The Tribe also monitors compliance with OSHA standards. PSOF, 16.

Where businesses operating on the Reservation have failed to meet Tribal standards for health, safety or quality, the Tribe possesses and actively exercises the authority, in cooperation with the BIA, to control or remove such businesses to preserve the character of the economic development. PSOF, 17.

The Tribe has contracted with the BIA for funds to provide governmental services on the Reservation, such as road maintenance and law enforcement. PSOF, 63. The State provides educational services for Indian children. The County provides free health services to members of the Tribe. DSOF, 111. The State regulates gaming on the Reservation. DSOF, 112.

The Hotel manager is not a Tribal member. DSOF, 27. The Hotel manager does not know how many of the Hotel employees are Tribal members and does not know if any of the Hotel employees live on the Reservation. DSOF, 28. The Hotel manager works closely with the vice president of the Grace companies and the Grace office in Phoenix. DSOF, 90-91.

The terms of the Lease:

(a) Entitles the Tribe to a base rental of $35,000 per year;

(b) Entitles the Tribe to at least one percent (1%) of the Hotel's gross receipts from business operations less the amounts received by PCC for transactional, excise, rental or other similar taxes; reimbursements for telephone charges; and franchise fees paid; starting in 1993, the additional rental equalled 1 and 1/4% of the gross revenues with the same subtractions;

(c) Entitles the Tribe to twenty percent (20%) of PCC's net cash flow after PCC's advances have been paid. Net cash flow consists of gross receipts less, *inter alia*, operating expenses, first mortgage principal and interest; leased furniture, fixture and equipment amortization; interest on a loan between the Tribe and PCC; and payment of taxes and debt service;

(d) entitles the Tribe to 30% of the net proceeds of any transfer of PCC's leasehold interest;

(e) Gives preferential treatment to Tribal members in the hiring of Hotel employees;

(f) Prohibits subleases by PCC without approval of both the Tribe and the Secretary of Interior.

(g) The Tribe is prohibited from imposing any transaction privilege tax upon PCC greater than 1%, but the 1% may be increased if the transaction privilege tax charged by the City of Prescott is increased above 1%;

(h) If the transaction privilege tax levied by the State upon the gross income of PCC resulting from the sale of tangible personal property is declared unconstitutional, the Tribe shall be entitled to increase the percentage levied under this tax ordinance to a percentage which is equivalent to the percentage levied by the State upon similar off-Reservation businesses;

(i) There is an option to renew the lease for 20 years;

(j) PCC is responsible to pay for all utilities and similar services during the term of the lease;

(k) The Tribe and PCC have entered into a sublease dated August 21, 1992, subleasing portions of the Hotel to the Tribe for purpose of conducting Class III gaming pursuant to the Tribal-State Gaming Compact between the Tribe and the State. DSOF, 85. The sublease is for a term of ten (10) years. *Id.*

PSOF, 19; DSOF, 77.

PCC has not paid taxes to the State, but has retained possession of the transaction privilege taxes derived from its operations. DSOF, 21.

C. *Discussion*

1. *Preemption*

The first issue in this lawsuit is whether the state transaction privilege taxes are preempted by the pervasive federal regulation of Indian trust lands. Because of the historical origins of tribal sovereignty, the general preemption principles that apply to other areas of the law are inapplicable to the preemption issues regarding Indian tribes. *White Mountain Apache Tribe v. Bracker,* 448 U.S. at 143. The preemption issue in Indian law is broader than the traditional preemption context.

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes . . . , and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 764 (1985). The Supreme Court has rejected the proposition that in order to find a particular state law to have been preempted, an express

congressional statement to that effect is required. *Bracker*, 448 U.S. at 144[3]. Rather, state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 377 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 170-71 (1973).

Where the state asserts authority over the conduct of non-Indians engaging in activity on the reservation, the courts must examine the language and policies of the statues [sic] with a particularized inquiry into the nature of the statute, federal, and tribal interests at state to determine whether the exercise of state authority violates federal law. *Bracker*, 448 U.S. at 145. State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. *Bracker*, 448 U.S. at 145. Some factors to be considered in the preemption question is the degree of federal regulation, the regulatory and revenue raising governmental interests of the tribe and state and the provision of tribal or state services provided to the party the state seeks to tax. *Salt River Pima-Maricopa Indian Community*, 50 F.3d 734, 736 (9th Cir.) (citations omitted), *cert. denied*, ___ U.S. ___, 116 S.Ct. 186 (1995).

The United States Supreme Court recently clarified the tests for preemption in *Oklahoma Tax Commission v.*

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[3] Ambiguities in federal law are generally construed in favor of Indian sovereignty. *Bracker*, 448 U.S. at 144.

Chickasaw Nation, ___ U.S. ___, 115 S.Ct. 2214 (1995). If Congress does not instruct otherwise, a State's tax is unenforceable if its "legal incidence" falls on a Tribe or its members for sales made within Indian Country. *Id.* When a state attempts to impose a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, the legal incidence rests on the tribe or tribal members and the state is without the power to impose such a tax. See *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); *also see e.g., Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976).

2. *Legal Incidence*

Therefore, the first question involves a determination of where the legal incidence of the tax rests. If on the Tribe or its members, it is not permitted, absent cession of jurisdiction or other federal statutes permitting it. If the legal incidence rests on non-Indians, if the balance of federal, state, and tribal interests favors the State, and federal law does not prohibit it, the State may impose the tax. *See Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154-57 (1980). Here, it is undisputed that Congress has never authorized the collection of the taxes at issue in this case.

The Arizona statute at issue in this action allows the State of Arizona to impose a transaction privilege tax. A.R.S. § 42-1306 states, in part:

> A. There is levied and there shall be collected by the department, for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county

> governments, to aid in defraying the necessary and ordinary expenses of the state and the municipalities and counties in this state, to reduce or eliminate the annual tax levy on property for state, municipal and county purposes and to reduce the levy on property of public school education, privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as prescribed by this article.

The Arizona state courts have determined that the Arizona transaction privilege tax is a tax on the privilege of doing business in the state. *Peabody Coal Co. v. State of Arizona*, 158 Ariz. 190, 761 P.2d 1094, 1096-97 (Ct. App. 1988) (non-Indian coal company operating on the Navajo and Hopi Reservations must pay transaction privilege tax on sales to non-Indians). The " 'privilege' relates not to the right to conduct the business, but to the benefits the state bestows on the taxpayer." *Peabody*, 761 P.2d at 1097 (citation omitted).

The Arizona tax legislation does not identify on whom the burden of the legal incidence of the tax falls. Therefore, the court must construe a fair interpretation of the taxing statutes as written and applied. *California State Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1985). Arizona transaction privilege taxes encompasses a wide range of taxes as evidenced by the statutory scheme of A.R.S. §§ 42-1301 *et seq.*

In other contexts, the Arizona courts have found that the legal incidence of an Arizona transaction privilege tax

rests on the seller. *J.C. Penney Co. v. Arizona Dep't of Revneue* [sic], 125 Ariz. 469, 472, 610 P.2d 471, 474 (Ct. App. 1980) ("The legal incidence of the transaction privilege tax is on the seller, or in the case of leases, on the landlord, even though it may be passed on to the customer or tenant").

In this situation, the transaction privilege tax is imposed on the use of the Hotel's rooms and restaurants. Thus, PCC is the seller in the transactions that the State seeks to tax. Contrary to the Tribe's assertions, the Tribe and PCC are not acting as a unit bearing the legal incidence of the imposition of the tax. The transaction sales tax is imposed on a "person", defined to include "any. . . . group or combination acting as a unit," A.R.S. § 42-1301(8). Merely because the Tribe is affected economically to some degree does not result in a combination acting as a unit with PCC, under the meaning of the statute.

Although the Tribe asserts that the legal incidence falls on the Tribe because the Tribe and PCC are "joint venturers", such an assertion is not based on any documented evidence, at least as far as the legal connotation of "joint venture" is concerned. Nor is there any legal documentation establishing the Tribe as a "co-owner" of the Hotel.

A joint venture consists of (1) a contract, (2) a common purpose, (3) a community of interest, (4) an equal right of control, and (5) participation in both profits and losses. *Waterman v. Rabinovitz*, 161 Ariz. 511, 779 P.2d 826 (Ct. App. 1989). In particular, the Tribe and PCC do not have an equal right of control over the leases and the

day-to-day management of the Hotel. For example, federal approval of the lease was required. Likewise, termination of the lease is subject to federal law and regulations. The Tribe cannot terminate the lease on its own. *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir.), *cert. denied*, 464 U.S. 1017 (1983). Nor does the Tribe have any significant influence on the day-to-day management decisions of operating the Hotel.

The Tribe and PCC also are not partners under the legal sense of a partnership under the Uniform Partnership Act. Under the UPA, a partnership is not established by the sharing of gross returns, nor by the sharing of profits if such profits are received in payment as a debt, as a rent to a landlord, or as interest on a loan. A.R.S. § 29-207(3) and (4)(a), (b) and (d). The lease states that the percentage of gross receipts and the possibility of a percentage of net cash flow are rent in consideration for a loan.

In defense of the argument that PCC operates the Hotel separate from the Tribe, defendants Scott and West rely on sworn affidavits submitted in a slip and fall case involving PCC in Yavapai Superior court. One of the affidavits from the Tribal Business Manager and one is from a Tribal attorney, Robert Brutinel. In particular, Brutinel states that he was "unaware of any agreement between the Tribe and the Prescott Convention Center, Inc. which could be construed as a joint venture." Exh. 3. However, in a later affidavit, filed in this lawsuit, Brutinel explains that in his opinion the legal conclusion submitted in the state court case was not the same legal conclusion applicable in this lawsuit. The Court assigns no

weight to Brutinel's testimony because the same affiant cancels out his own statement.

The Court concludes that the legal incidence of the tax does not fall primarily on the Tribe. The Tribe does not operate the Hotel, nor is the Tribe acting in union with PCC in operating the Hotel. The Tribe is not a co-owner of the Hotel. The Tribe is a lessor and a sublessee (for operation of the casino)[4]. Thus, the legal incidence primarily falls on PCC. Additionally, the payment of the tax is passed on to the non-Indian taxpayer.

The Tribe concedes that no legal partnership exists. Reply, at 3. Although the legal incidence of the tax mainly falls on PCC, that determination does not end the inquiry. The Court also must consider which entity bears most of the economic burden. See *Ramah Navajo School Bd. Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 844, n.8 (1982) (the legal incidence and the economic burden of the tax must both be considered because they are not always the same). The Court further discusses the economic impact on the Tribe below.

3. Balance of Federal, State and Tribal Interest

Because the legal incidence of the tax does not fall on the Tribe, the court must balance the federal, state and tribal interests at issue. While balancing these interests,

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[4] The Ninth Circuit has stated that, in entering into a lease agreement, a Tribe conveys its possessory interest in the land for a designated period of time, retaining a reversionary interest in the land. *Red Mountain Machinery Co. v. Grace investment Co.*, 29 F.3d 1408 (9th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 639 (1994).

the State's ability to tax is allowed or disallowed on a continuum.

Some of the factors to be considered are whether the value of the goods and services were generated on the reservation, the economic impact on the Tribe, the concerns of tribal self-government and autonomy, the regulatory and revenue raising governmental interests of the Tribe and the State and the amount and nature of tribal or state services provided to the party the State seeks to tax.

In considering whether the value is generated on the reservation, the Court turns to the guidance expressed in several decisions. Many of the decisions involve taxes on cigarette sales on the Reservations[5]. Other decisions involve taxes on the development of tribal natural resources ranging from mining and logging to hunting and fishing to hotels and casinos. One of the major considerations is whether the goods and services primarily sold to non-Indians by non-Indians on the Reservation are derived from value generated on the reservation.

In *Salt River, supra,* the Ninth Circuit found that the State of Arizona could collect taxes on sales and rental transactions by non-Indian businesses selling products and services on the Indian reservation to non-Indians. In *Salt River,* the Pima and Maricopa Tribes leased land on the reservation to a non-Indian developer to develop a

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[5] In the cigarette cases, the tribes import the cigarettes onto the reservation, where they are sold to individuals. The only value the tribe contributes is the value to not pay the state sales tax, i.e., the marketing of a tax loophole.

shopping mall in the greater Phoenix area known as the Scottsdale Pavilions. The leases were for fifty-five years.

The Ninth Circuit considered whether the Tribes were developing and marketing a tribal resource, whether the goods and services sold were non-Indian, whether the legal incidence of the taxes fell on non-Indians and whether the State and its agents provided the majority of the government services used by these taxpayers. *Salt River,* 50 F.3d at 737[6]. However, the Ninth Circuit explained that "[T]here may be a limit on state taxation where it effectively prevents appropriate taxation by an Indian tribe." 50 F.3d at 738. The Ninth Circuit distinguished *Gila River Indian Community v. Waddell,* 967 F.2d 1404 (9th Cir. 1992) by noting that in *Gila River* the Tribe's activities contributed to the value of the services, the Tribe maintained an active role in the business enterprise by developing and marketing on-reservation entertainment to the public, and the Tribe shared in the profits of the enterprise and collected the monies received from the entertainment.

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[6] The Ninth Circuit relied on *Colville,* in which the United States Supreme Court stated:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The state also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Colville, 447 U.S. at 156-57.

In *Salt River*, the mall earns its profits by importing non-Indian products on to the reservation for resale to non-Indians, the Tribe contributes little to the value of the products and services sold at the mall, the businesses are managed by non-Indians and the Tribe does not participate in business decisions nor share in the profits. The Tribe does not receive rent from the mall, but rather, receives tax revenues. The Tribe collects a 1 percent sales tax on gross receipts from sales exceeding $100 to $200 million at the mall. The State collects sales taxes of 5.5 percent on purchases by non-Indians. The State also taxes the rental receipts (4.5 percent) the mall developer receives from the subtenants under the commercial lease classification of the Arizona transaction privilege tax.

In *Gila River*, the Ninth Circuit considered whether the district court's dismissal was appropriate concerning an Arizona transaction privilege tax imposed on entertainment events occurring on the Gila Reservation. The Ninth Circuit noted several important factors considered in finding that the Tribe played an active role in generating activities of value and gave the Tribe a strong interest in maintaining those activities free from state interference. In particular, the Ninth Circuit noted the following: The Tribe relied on a comprehensive federal regulatory scheme governing the development and leasing of Firebird Lake property; The Tribe constructed Firebird Lake and Sun Valley Marina using federal funds and assistance; The Tribe leased the Firebird Lake property to its own tribal corporation; the tribal corporation subleased the parcels to non-Indians; the Tribe receives significant revenues from the theatrical and sporting events that take place on its property, in the form of a base rent paid by its

lessees, a percentage of their gross receipts, and a sales tax; the Tribe continues to work closely with those companies to ensure the quality of entertainment to the public; the Tribe regulates and monitors the property, enforcing tribal ordinances concerning water quality, pest control, sanitation and sewage disposal; the Tribe limits the size of the audiences at the performances; approves or rejects additional construction by its lessees; coordinates law enforcement and security at the events conducted on its land, and; a significant number of tribal members are employed by the sublessees.

In *Red Mountain,* the Ninth Circuit considered the issue of whether an Arizona state law of general applicability, the Arizona mechanics' lien statute, may be applied to allow foreclosure of a leasehold interest in Yavapai-Prescott Indian Tribe land held by a non-Indian. The Ninth Circuit did not considered [sic] the fact-specific balancing test. Rather, by approving the lease that contained the provisions providing that Arizona law would apply to controversies related to the construction project, the Ninth Circuit determined that the Secretary of the Interior contemplated and authorized enforcement of mechanics' liens by foreclosure against the leasehold.

Here, the Hotel is located on Tribal land and the building is owned by the Tribe as are all the improvements. The Tribe relied on a comprehensive federal regulatory scheme for developing and leasing the Hotel. The Tribe used federal funds and assistance for building the Hotel. The building of the Hotel and the lease arrangement were subject to federal approval. Indian lands, including the leasing of those lands, are subject to pervasive federal regulation. *See,* 25 U.S.C.A. § 391, *et seq.*; 25

C.F.R. § 150 *et seq.* Pursuant to federal regulation, leases of tribal land or land held in trust for the benefit of Indians must be approved by the Secretary of the Interior. 25 C.F.R. § 162 *et seq.*

The Hotel is connected to a casino that the Tribe owns and operates. Tribal gaming is governed by a comprehensive federal statute, the Indian Gaming Regulation Act ("IGRA"), 25 U.S.C. § 2701, *et seq.* There is no indication in the record that these taxes are imposed on any aspect of the gaming-related activities.

In *California v. Cabazon*, 480 U.S. 202 (1987), the Cabazon and Morongo Bands of Mission Indians operate bingo and card games and facilities and services related to gaming.

In *Cabazon*, the Supreme Court states:

> Here, however, the Tribes are not merely importing a product onto the reservations for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. The tribal bingo enterprises are similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources.

480 U.S. 219-220 (citations and footnotes omitted).

Here, the Yavapai-Prescott Tribe has shown that the Hotel is connected to the casino. The Hotel advertises primarily in Arizona and California. The promotional materials and advertisements for the Hotel include the ability to gamble at the casino (Bucky's Casino). In fact, the promotional materials identify the Hotel as the "Prescott Resort Conference Center and Casino". The materials also state:

> "Bucky's Casino and Lounge is Arizona's only hotel casino. Open 24 hours a day, Bucky's Casino features slots and poker machines."
>
> Defendants' Exh. Z.

The Tribe subleases for the operation of a casino connected to the Hotel. The Tribe relies on a comprehensive federal scheme concerning the operation of the casino. The Tribe receives revenues from the events at the Hotel ranging from room rentals to food and drink services. The Tribe receives a base rent from the Hotel and a percentage of the net profits. The Tribe regulates food, safety and health related activities at the Hotel. The Tribe coordinates law enforcement and fire protection for the Hotel. The Tribe pays the Yavapai County Sheriff a sum each year for law enforcement services. Those funds are federal funds paid to the Tribe by the BIA. PSOF, 1, Exh. J. The Tribe pays the Central Yavapai Fire District to receive fire protection and emergency medical services, but the Tribe charges PCC for this service. PSOF, 1, paras. 99-100. The Tribe issues a sales tax license for businesses selling goods on the Reservation. Rice, at 17. The Tribe also issues a food service permit and conducts health inspections. Rice, at 17-18.

The State provides the traffic lights near the hotel. The State regulates the Hotel through liquor licensing and enforcement. The State provides services to the Tribe in the form of public education, road maintenance and traffic control.

The United Sates has spent $40,000 on each of the traffic lights that control traffic on State Highway 69, the State road that traverses the Reservation. Access to the Hotel involves highway 69. The evidence in the record is unclear about how many tribal members are employed at the Hotel.

Thus, the Tribe plays an active role in generating activities of value on its reservation that are being taxed. The State's involvement and interests, other than generating tax revenues, is minimal. The State has involvement in the traffic lights, liquor licensing and providing road maintenance and education for Indian children. At best, this involvement is minimal in comparison to the overriding federal and Indian concerns at stake. State jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interest, unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico, et al., v. Mescalero Apache Tribe,* 462 U.S. 324, 333-334 (1983).

4. Tribal Sovereignty and Economic Development

The doctrine of tribal self-government focuses on whether the right of reservation Indians to make their own laws and be ruled by them has been infringed. See *U.S. v. Wheeler,* 435 U.S. 313, 323 (1978); *Williams v. Lee,*

358 U.S. 217, 220 (1959). A reduction of Indian tax and business revenues does not necessarily violate the right of tribal self-government. *Colville*, 447 U.S. at 157-58; *Squaxin Island Tribe v. Wash.*, 781 F.2d 715, 720 (9th Cir. 1986) (a state tax or regulation is not invalid merely because it erodes a tribe's revenues, even if the tax substantially impairs the tribal government's ability to sustain itself and its programs). However, the inquiry must include the notions of Indian sovereignty and the congressional goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development. *Cabazon*, 480 U.S. at 216.

Under the terms of the lease, the Tribe receives lease payments of a base rental of $35,000 per year, payable in six month installments, a lease rental of 1% to 1 and 1/4% based on the gross receipts of the hotel, minus the amounts PCC receives for transaction privilege tax (and other matters), and 20% of the project annual net cash flow, minus operating expenses. The Tribe has received some payments under both the lease rental and the 20% scheme. The Tribe is prohibited under the lease from imposing any transaction privilege tax upon PCC greater than 1%, but the 1% may be increased if the transaction privilege tax charged by the City of Prescott is increased above 1%.

Although the Tribe argues that the availability of gaming attracts some people to the Hotel and contributes to the Hotel's success, the Tribe does not argue that the taxes at issue are imposed on the gaming operations or the amount of revenue the Tribe derives from gaming. However, the connection between the gaming operation and the Hotel for purposes of these motions concerns the

attraction and value generated on the reservation, not the monies made from gaming.

The Tribe's economic situation and associated self-determination are influenced by the success of Hotel (and casino). The State's taxes affect the Tribe's right to impose its own tax, and reduces the pool of profits available for distribution to the Tribe.

The Tribe's interest and the federal interests at stake outweighs the State's interests. After careful consideration of all the factors, the Court concludes that the balance tips in favor of the Tribe. The State has little to do with the Hotel activity. Although at the present time this tax is not unusually large, it has imposed a substantial burden on the limited income of the Tribe. See *Cotton*, 109 S.Ct. at 1713. The Court concludes that this case is more akin to *Gila River, Cabazon* and *Mescalero* than to the cigarette cases or even *Salt River*. The taxes impermissibly interfere with the Tribal and federal interests in economic development.

5. Whether the Tax is Narrowly Tailored

Finally, the Court must consider whether the balance favors the State concerning whether the purpose of the tax is narrowly tailored to the funding of services on tribal land. Defendants concede that the revenues generated from the imposition of the Arizona Transaction Privilege Tax in this situation are not segregated for purposes of providing services to the Tribe. According to the statute, the revenues generated are available for general state purposes and to reduce property taxes in the state.

The Supreme Court has rejected the idea that a tax imposed on reservation activities must be proportionate to the services provided to the Indians.

> Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector.

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185, n. 15 (1989) (citations omitted).

However, a limit on state taxation can exist where it effectively prevents appropriate taxation by the Tribe. *Salt River*, 50 F.2d at 738. Moreover, the state can avoid the preemption of its taxing authority in a situation with strong federal and tribal interests if the taxes are "narrowly tailored" to funding service in connection with the activities on the tribal land. *See Hoopa Valley*, 881 F.2d at 661.

It is undisputed that the taxes are not narrowly tailored to provide services to the Tribe. Additionally, to some extent, the state's transaction privilege tax in this situation displaces the Tribe's right to impose its own tax, and therefore, reduces the pool of profits available for distribution to the Tribe. Thus, the Court concludes that the Tribe has established that the transaction privilege tax which the State of Arizona is imposing on the activities at the Hotel is preempted by federal law.

D. Seminole Tribe of Florida v. Florida

On March 27, 1996, the United States Supreme Court rendered a decision determining that the Eleventh Amendment prevents Congress from authorizing lawsuits by Indian tribes against States to enforce legislation enacted pursuant to the Indian Commerce Clause concerning the Indian Gaming Regulatory Act. *Seminole Tribe of Florida v. Florida, et al.*, ___ U.S. ___, 116 S.Ct. 1114 (1996). Because the issues in *Seminole Tribe* involved Indian gaming, the state and the Eleventh Amendment, and to exercise caution, before issuing this decision, this Court allowed the parties to brief whether this new Supreme Court decision had any impact on this lawsuit. On April 28, 1996, the parties stipulated that the aforementioned decision has no impact on this action, that this Court has subject matter jurisdiction over this action and that no defendant has Eleventh Amendment immunity with respect to the relief plaintiff seeks.

CONCLUSION

The Court concludes that the scales are delicately balanced in reaching a determination of this case. After reviewing all the relevant case law and carefully considering all the facts of this case, however, the Court finds that the balance tips against permitting the levying, collecting or assessing taxes against PCC.

This case is more akin to those cases where an Indian resource or service is being sold on the reservation rather than the cases where a non-Indian products are being imported to the reservation for resale to non-Indians and transported back off the reservation. The Tribe is actively

involved in regulating and monitoring the activities at the Hotel, including enforcing tribal ordinances concerning health and safety and discrimination issues. Of great importance is the fact that the Tribe plays an active role in increasing the value of the Hotel by associating with the Hotel in the operation of the casino. Indeed, the Hotel now actively promotes the ability to stay at the facilities and gamble. The Tribe suffers economic burdens as a result of these taxes, not only due to less income from the gross receipts but also the inability to increase its own taxes. In short, the Tribe has built modern facilities which provide recreational opportunities and ancillary services to the patrons, who spend extended periods of time at the Hotel enjoying the surroundings and activities.

Additionally, the State does not provide substantial services to the Tribe or the lessee (PCC) in connection with the Hotel. Nor does the State provide comprehensive regulations of the activities of the Hotel. The Tribe also has established a strong federal interest in the development and leasing of the Hotel. The Hotel was first constructed using federal funds and assistance. The federal scheme supported the development project of furthering the Tribe's economic well-being. The federal government through the Secretary of the Interior has promulgated detailed regulations governing leasing to ensure "the highest economic return to the [tribal] owner consistent with prudent management and conservation practices. . . . " 25 C.F.R. § 162.8 (1991).

The Tribe has shown that the imposition of the state taxes will cause it direct, serious, and irreparable injury and economic loss. If the Hotel and casino continue to

improve, the Tribe will stand in a better economic position for tribal self-sufficiency. The State's interest in raising this revenue to fund state services on and off the reservation is minimal. Because the value of the events Arizona seeks to tax are generated on the reservation, because the Tribe and federal government are extensively involved in the services, and because the tax will infringe on the ability of the Tribe to govern itself, the Court concludes that the balance of federal, state and tribal interest renders the state's assertion of taxing authority unreasonable.

Based on the foregoing, IT IS ORDERED THAT:

(1) Defendants' motion to dismiss crossclaim (Doc. # 16) IS DENIED.

(2) Defendant PCC's motion for summary judgment (Doc. # 36) IS GRANTED.

(3) Plaintiff's motion for summary judgment (Doc. # 38) IS GRANTED.

(4) Defendant West's motion for summary judgment (Doc. # 39) IS DENIED.

(5) No later than May 3, 1996, plaintiffs shall lodge an order setting forth the injunctive relief sought that is in conformity with this order and the request for relief.

(6) No later than May 10, 1996, defendants may file any objections to the language of the injunction with specific explanations for each objection.

(7) If possible, the parties shall stipulate to the language of the injunction and relief sought.

Dated this 24 day of April, 1996.

/s/ C.A. Muecke
C.A. Muecke
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

YAVAPAI-PRESCOTT INDIAN TRIBE, Plaintiff-Appellee, v. HAROLD SCOTT, in his official capacity as Director of the Arizona Department of Revenue; TONY WEST, in his official capacity as Treasurer of the State of Arizona, Defendants-Cross-Defendants-Appellants, v. PRESCOTT CONVENTION CENTER, INC., an Arizona corporation, Defendant-Cross-Claimant-Appellee.	No. 96-16416 D.C. No. CIV-95-0124-CAM **ORDER** (Filed Aug. 12, 1997)

Before: PREGERSON, NOONAN, and KLEINFELD, Circuit Judges

The majority of the panel as constituted in the above case has voted to deny the petition for rehearing. Judge Kleinfeld voted to reject the suggestion for rehearing en banc. Judge Noonan recommended rejection of the suggestion for rehearing. Judge Pregerson voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

YAVAPAI-PRESCOTT INDIAN TRIBE, Plaintiff, vs. HAROLD SCOTT, in his official capacity as Director of the Arizona Department of Revenue; TONY WEST, in his official capacity as Treasurer of the State of Arizona; and PRESCOTT CONVENTION CENTER, INC., an Arizona corporation, Defendants.	No. CIV 95-0124-PCT-CAM DECLARATORY JUDGMENT AND INJUNCTION (Filed Jun. 13, 1996)

On April 24, 1996, this Court entered a Memorandum and Order granting summary judgment in favor of plaintiff and against defendants in the above-captioned action. Accordingly, it is ORDERED AND ADJUDGED as follows:

1. Imposition of the Arizona Transaction Privilege Tax on room rentals and food and beverage sales at the Hotel (presently known as the "Prescott Resort and Conference Center") on the Yavapai-Prescott Indian Reservation is impermissible pursuant to the doctrines of Federal Preemption and Tribal Sovereignty under federal law. In view of

the foregoing holding, the Court need not reach the merits of the equal protection arguments advanced in the cross-claim filed by defendant Prescott Convention Center, Inc.

2. Defendants and their successors are permanently enjoined from taking any action to levy assess or impose the Arizona Transaction Privilege Tax on Room rentals and food and beverage sales at the Hotel on the Yavapai-Prescott Indian Reservation.

3. Defendants and their successors are permanently enjoined from taking any action to collect the Arizona Transaction Privilege Tax (including interest and penalties) on room rentals and food and beverage sales at the Hotel on the Yavapai-Prescott Indian Reservation.

4. Defendants Scott and West and their successors are permanently enjoined from taking any action to retain revenues (including interest and penalties) collected pursuant to any imposition of the Arizona Transaction Privilege Tax on room rentals and food and beverage sales at the Hotel on the Yavapai-Prescott Indian Reservation.

5. Defendant Prescott Convention Center, Inc. is permanently enjoined from paying the Arizona Transaction Privilege Tax on room rentals and food and beverage sales at the Hotel on the Yavapai-Prescott Indian Reservation, except to the extent permitted by plaintiff. This injunction against Prescott Convention Center, Inc. shall terminate automatically if the foregoing injunction

against Scott and West is reversed or dissolved.

Dated this 10 day of June , 1996.

/s/ C.A. Muecke
United States
District Judge

Supreme Court, U.S.
FILED
DEC 10 1997
CLERK

No. 97-788 (2)
97-796 (2)

In The

Supreme Court of the United States

October Term, 1997

PRESCOTT CONVENTION CENTER, INC.,

v. *Petitioner,*

HAROLD SCOTT, TONY WEST, AND YAVAPAI-PRESCOTT INDIAN TRIBE,

Respondents.

YAVAPAI-PRESCOTT INDIAN TRIBE,

v. *Petitioner,*

HAROLD SCOTT, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE; TONY WEST, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF ARIZONA; AND PRESCOTT CONVENTION CENTER, INC., AN ARIZONA CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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19 pp

QUESTIONS PRESENTED

1. Does federal law preempt a State from imposing a tax on a non-Indian business operating a hotel and restaurant serving non-Indian customers?

2. Does a State's tax imposed on a non-Indian business operating a hotel and restaurant serving non-Indian customers impermissibly interfere with tribal sovereignty?

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SUPPLEMENTAL STATEMENT OF THE CASE

The Yavapai-Prescott Indian Reservation ("Reservation") is located next to, and almost completely surrounded by, the City of Prescott, Arizona. Pet. App. 3 (the Appendices to the Petitions have identical page numbering). Prescott Convention Center, Inc. ("PCC"), an Arizona corporation, built and operates a hotel and restaurant ("Hotel") on the Reservation pursuant to a 1983 long-term lease with the Yavapai-Prescott Indian Tribe ("Tribe"). *Id.*

Under the terms of the lease PCC pays the Tribe a base rent and a percentage of the Hotel's gross receipts. Pet. App. 3. In consideration for a loan of the proceeds of a federal grant received by the Tribe, PCC also pays the Tribe twenty percent of the net cash flow of the Hotel. Pet. App. 3-4. To date, no payments of net cash flow have been made. CR 40 (district court record), Ex. QQ. Both the percentage of gross receipts and net cash flow payments are calculated after deducting any taxes passed on to customers. Pet. App. 38-39. PCC has collected the state tax from its customers from the beginning of its operation by adding the tax due to the bills of customers. Pet. App. 33, 40.

The Hotel has 161 rooms, includes a restaurant, and has the capacity to serve as many as 1,200 meals. Pet. App. 4-5. Most of the Hotel's business comes from the Phoenix metropolitan area, approximately ninety miles from the Reservation. CR 40, Ex. RR. Visitors are attracted by off-Reservation advertising and through the efforts of a sales office in Phoenix. *Id.*

The Tribe does not exercise control over the operations or management of the Hotel. *Id.* PCC does not need to obtain Tribal approval before renting a room or scheduling a conference, and PCC is completely responsible for the maintenance and upkeep of the Hotel. *Id.*; Pet. App. 4. Although the Hotel employs between 150 and 200 people, none of the employees are Tribal members, and there is no evidence that any Hotel employees reside on the Reservation. Pet. App. 12.

Petitioners misstate the record when they say the State does not provide services to the Hotel. Law enforcement services are provided by the Yavapai County Sheriff's office. Pet. App. 36. The Sheriff has always had jurisdiction over and responsibility for law enforcement concerning crimes committed on the Reservation between non-Indians. *United States v. McBratney*, 104 U.S. 621 (1881). Prior to 1993, the Sheriff responded to calls from the Hotel and arrested non-Indians for crimes committed there. Pet. App. 36. In 1993, the Tribe entered an agreement to pay the Sheriff to exercise jurisdiction over Indians, and since then the Sheriff has exercised both State and tribal powers. Pet. App. 36-37. The payments made by the Tribe are not compensation for the jurisdiction exercised over non-Indians, because the Tribe has no authority to grant such jurisdiction.

PCC receives fire and emergency medical services from the Central Yavapai Fire District. Pet. App. 37. Although the District normally would not have jurisdiction on a reservation, it has agreed to provide services in exchange for a fee which substitutes for the property tax it charges off-Reservation property owners. *Id.* This cost is passed directly on to PCC by the Tribe. *Id.*

The State provides traffic control on the Reservation. *Id.* Also, the main roads through the Reservation are State highways, including the public roads leading to the Hotel. *Id.* The State maintains and patrols these roads. The State has also installed traffic lights on the Reservation, including one at the entrance to the Hotel that controls all traffic going to the Hotel, with the cost being split between the State and the Bureau of Indian Affairs. *Id.* The State maintains these traffic lights at its own expense. *Id.*

The State and Tribe share regulatory jurisdiction over the activities at the Hotel. The State and Tribe concurrently regulate liquor sales on the Reservation and the casino operated by the Tribe on the Hotel property. CR 40, Ex. M; Pet. App. 38. While the State has not exercised regulatory authority at the Hotel over certain matters such as health and food inspection (which the Tribe has actively regulated), the State has never conceded that it lacks authority to regulate non-Indians who pose a threat to the health and safety of other non-Indians, even if the activity takes place on an Indian reservation. *Brendale v. Confederated Yakima Nation*, 492 U.S. 408 (1989). The State also provides a forum for the resolution of civil and criminal litigation between non-Indians arising on the Reservation, and PCC has been a party in State court for its activities at the hotel. CR 40, Ex. W.

It is undisputed that the State provides significant services to Tribal members. Reservation residents attend State public schools outside the Reservation, specifically in the Prescott Unified School District and at Yavapai College. Pet. App. 38. The State provides significant financial support to these schools. Some members of the

Tribe who reside on the Reservation receive benefits administered by the Arizona Department of Economic Security. CR 40, Ex. PP. In addition, the Yavapai County Health Department provides free health services to members of the Tribe both on and off the Reservation. Pet. App. 38.

ARGUMENT

I. THE TRIBE'S ARGUMENT THAT THE STATE TAXES ARE DISCRIMINATORY WAS NOT RAISED IN THE LOWER COURTS.

The Tribe's primary argument is that the Arizona tax is discriminatory. Tribe's Petition 8-11. This argument was never raised below. While the Tribe argued that the tax was preempted by federal law and infringed on tribal sovereignty because the Tribe was forced to provide services that were provided at State expense off-reservation, the Tribe never argued in its complaint, in its pleadings to the district court, or in its brief to the court of appeals that this made the taxes discriminatory. Neither the court of appeals nor the district court addressed the issue of discrimination. Indeed, the only case cited by the Tribe in its Petition as support for its discrimination argument, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), was not even cited by either the Tribe or PCC in their briefs to the court of appeals.

Discrimination is not fairly included within the issue of preemption. Preemption analysis depends on whether Congress has granted a tribe immunity from taxation

"either expressly or by plain implication." *Cotton Petroleum*, 490 U.S. at 175-6. Discrimination depends on unequal enforcement of a tax. If the issue of discrimination had been raised below then the State could have shown that most of the services that the Tribe alleges are not provided to the Reservation are in fact provided by local governments in Arizona and that these governments are funded primarily by the property tax, a tax which is not imposed on the Hotel or any other Tribal property.

Moreover, there is no dispute that the State taxes are applied to hotels and restaurants outside the Reservation, and the customers who pay the tax as a part of their bills are non-Indians who reside outside the Reservation and benefit from all State services. The State applies the taxes to all similarly situated businesses, so there is no discrimination.

The Tribe cannot raise the issue of discrimination for the first time in its Petition. *Yee v. City of Escondido*, 503 U.S. 530, 533 (1992). To the extent the Petition challenges the taxes as being discriminatory, the Petition should be denied.

II. A STATE TAX IS NOT PREEMPTED SIMPLY BECAUSE A TRIBE INCURS COSTS TO PROVIDE SERVICES TO NON-INDIAN BUSINESSES.

The Tribe complains that "the State forces the Tribe to furnish to the Hotel the same government services that the Taxes fund for off-Reservation taxpayers." Tribe's Petition at 9. The State has no such power. As shown above, the State provides services to the Reservation to the extent of its authority. Tribal sovereignty limits the

State's criminal and civil authority over Tribal members and property, including the Hotel itself because the Tribe holds legal title to the building. Nevertheless, the State has worked cooperatively with the Tribe to exercise their concurrent jurisdiction. *Cf. Cotton Petroleum*, 490 U.S. at 189 ("Unless and until Congress provides otherwise, each of the other two sovereigns has taxing jurisdiction over Cotton's leases.").

The shared sovereignty of the Tribe and State over non-Indian activities on the Reservation gives the Tribe responsibilities that may cost it money. The Tribe may choose to fulfill its responsibilities directly or by paying other local governments to perform certain functions, but that choice does not reduce the State's power to tax non-Indians on the Reservation. The Tribe is not paying State political subdivisions for services to which it is otherwise entitled. It is paying those agencies to exercise Tribal authority and provide services for which the Tribe, as a local government, is responsible.[1]

The Tribe's complaint that the court of appeals abandoned its test that State taxes must be "narrowly tailored" to providing services on the Reservation is both wrong and a misstatement of precedent. Tribe's Petition at 10. The Ninth Circuit has never held that a State tax imposed on non-Indians must be "narrowly tailored" to State services to the reservation. The cases which have required a "narrow tailoring" have all involved taxes imposed on or passed onto a tribe or tribal resources.

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[1] In fact, the Tribe and PCC agreed in the lease that the Tribe would have no responsibility to provide or pay for police protection, fire protection, or street maintenance. Pet. App. 4.

Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990); *Crow Tribe of Indians v. Montana*, 819 F.2d 895 (9th Cir. 1987), *summarily aff'd*, 484 U.S. 997 (1988). In other words, the narrowly tailored requirement is only triggered when the tax is effectively a tax on the tribe itself, and has actually been discussed by the court of appeals as a means for a State to justify a tax on a tribe in the face of strong federal and tribal interests. *Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1412 (9th Cir. 1992) ("We have previously held that a State may avoid the preemption of its taxing authority in a case where strong federal and tribal interests exist only if its taxes are 'narrowly tailored' to funding the services it provides in connection with the activities taking place on tribal land."). Given the strong federal policy of tribal immunity from state taxation, it makes sense that a tax on a tribe will be upheld only if connected to services provided to the tribe or tribal members.

Such a requirement makes no sense when the tax is imposed on commercial transactions between non-Indians. There is no federal policy or tradition favoring tax immunity of non-Indians, particularly when conducting business between themselves. If there is no tradition of tribal sovereignty, or tribal immunity from State law, this Court has recognized that tribal interests do not act to bar State jurisdiction. *Cotton Petroleum*, 490 U.S. at 182 ("There is, accordingly, simply no history of tribal independence from state taxation of these lessees to form a 'backdrop' against which the 1938 Act must be read."); *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("If, however, we do not find such a tradition, . . . our pre-emption analysis

may accord less weight to the 'backdrop' of tribal sovereignty."); *see also Strate v. A-1 Contractors*, 117 S.Ct. 1404, 1409 (1997) ("In the main, the Court explained, 'the inherent sovereign powers of an Indian tribe' – those powers a tribe enjoys apart from express provision by treaty or statute – 'do not extend to the activities of nonmembers of the tribe.' ").

This Court has repeatedly upheld State taxes on non-Indians without requiring a direct connection between the tax and State services to the reservation. *Oklahoma Tax Com'n v. Chickasaw Nation*, 115 S.Ct. 2214 (1995) (income tax); *Department of Taxation v. Milhelm Attea*, 114 S.Ct. 2028 (1994) (tobacco taxes); *Cotton Petroleum, supra* (mineral taxes); *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) (tobacco taxes). Whether a State provides services or has abandoned an on-reservation activity may be one factor in determining the strength of federal and tribal interests, *see Ramah Navajo School Board v. New Mexico*, 458 U.S. 832 (1982) (state closed public high school), but when those interests are weak because the taxed transactions involve only non-Indians the existence or scope of state services is of little weight. The court of appeals recognized this. Pet. App. 11 ("[T]he requirement of narrow tailoring is elusive and its appropriateness remains dependent on the strength of the tribal and federal interest found to exist.").

In *Cotton Petroleum* this Court rejected the argument that there must be a strict *quid pro quo* between the taxpayer and the tax collector, stating that taxes need not be proportionate to the services provided. *Cotton Petroleum*, 490 U.S at 184. The Tribe's argument merely rephrases the argument rejected in *Cotton Petroleum*, and

makes no sense when applied to taxes imposed on non-Indian transactions.

The court of appeals correctly rejected the Tribe's argument that a connection between a tax and State services is a precondition to any imposition of State tax.[2]

III. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH SUPREME COURT PRECEDENT.

Both the Tribe and PCC argue that the court of appeals erred in its analysis by giving considerable weight to the fact that the Hotel is operated by a non-Indian lessee. Tribe's Petition at 11-17; PCC's Petition at 10-12. They ignore the fact that whether a person is a tribal member is the first, and often controlling, question in any inquiry concerning jurisdiction on Indian reservations.

This Court has repeatedly noted the importance of the fact that transactions involve non-tribal members. In *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980), and *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), State taxes on non-Indians

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[2] PCC's assertion that the court of appeals' decision is inconsistent with a Tenth Circuit holding is wrong. PCC's Petition at 11-12, *citing Indian Country U.S.A. v. Oklahoma State Tax Comm.*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S 1218 (1988). In that case the Tenth Circuit specifically found the bingo operation to be a tribal enterprise, and consequently determined that the State improperly attempted to regulate a transaction between a tribe and non-Indians. The presence of non-Indian capital was a factor to be considered, as it was in this case, but it was not controlling.

were held to be valid, primarily because the taxes were imposed on non-Indians and not a tribe. Indeed, *Cotton Petroleum* noted that "[i]t is important to keep in mind that the primary burden of the state tax falls on the non-Indian taxpayers." 490 U.S. at 187, n.18. *See also Department of Taxation v. Milhelm Attea*, 114 S.Ct. 2028 (1994) (Indian trader statutes did not prevent a state from imposing burdens on sales by wholesalers to Indian retailers who in turn sold to non-Indian consumers).

Increased State interest in transactions between non-Indians is consistent with this Court's holding that any Indian preemption analysis involves a balancing of federal, tribal, and state interests, and "the traditional notions of Indian sovereignty provide a crucial 'backdrop' against which any assertion of state authority must be assessed." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983). Tribal sovereignty over non-members is limited. *Strate v. A-1 Contractors*, 117 S.Ct. 1404 (1997) (no tribal court jurisdiction over tort between non-members on state highway); *Montana v. United States*, 450 U.S. 544, 565 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."); *see also South Dakota v. Bourland*, 508 U.S. 679, 695, n.15 (1993) (*quoting Montana*, 450 U.S. at 564) ("[A]fter *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation.' "). State law applied to non-Indians engaged in commercial transactions with other non-Indians does not infringe on tribal sovereignty because the law is not imposed directly on the tribe or a transaction with the tribe, only the non-Indians.

Petitioners' reliance on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), is misplaced. Tribe's Petition at 14-15; PCC's Petition at 7. In *Cabazon*, the games were owned by the tribes themselves, and "the state and county laws at issue [were] imposed directly on the Tribes that operate the games." *Id.* at 214. The tribes in *Cabazon*, unlike the Tribe here, did not merely give a long-term interest in real property to non-Indians and leave them to organize, operate and manage a non-tribal business.

Although Petitioners cite with approval the dissent in the court of appeals, the dissent actually conflicts with this Court's decisions because it gave controlling weight to the general federal policy of encouraging reservation economic development. Pet. App. 21-26. This Court's decisions plainly hold that such general interests are not sufficient to show preemption. *Cotton Petroleum*, 490 U.S. at 183, n. 14; *Colville*, 447 U.S. at 155. The dissent also found a comprehensive federal regulatory scheme in statutes which do not regulate the transactions being taxed, the sales by PCC to its non-Indian customers. Pet. App. 23. This Court has never held a State tax on non-Indians to be preempted in the absence of federal statutes that directly regulate the taxed activity, yet Petitioners seek that result.

The court of appeals correctly applied this Court's precedents in holding that non-Indian transactions taking place at the Hotel are taxable.

IV. EXECUTIVE BRANCH SUPPORT FOR RESERVATION ECONOMIC DEVELOPMENT DOES NOT PREEMPT A STATE TAX ON NON-INDIANS DOING BUSINESS WITH OTHER NON-INDIANS.

PCC argues that the court of appeals' decision is contrary to executive branch policies favoring economic development on Indian reservations. PCC's Petition at 6-9. This argument is without merit for several reasons.

First, while a state tax may be preempted by federal law, it is Congress which makes law, not the executive branch. As this Court stated in *Cotton Petroleum*, the "question for us to decide is whether Congress has acted to grant the Tribe such immunity, either expressly or by plain implication." 490 U.S. at 175-6. "[D]etermining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent." *Id.* at 176. Executive statements and acts may be used to provide insight into congressional intent, but they cannot constitute federal law sufficient to preempt a state tax. Moreover, as discussed above, no act of Congress has shown any intent, express or implied, to preempt a state tax on commercial transactions between non-Indians.

Second, PCC fails to recognize that economic development may take place without barring a State from imposing its taxes or to cite a single law or executive statement relating to taxation. PCC considers any tax burden as being contrary to federal policy. This argument is meritless. *Cotton Petroleum*, 490 U.S. at 180 ("We thus agree that a purpose of the 1938 Act is to provide Indian

tribes with badly needed revenue, but find no evidence for the further supposition that Congress intended to remove all barriers to profit maximization.") and 490 U.S. at 179 ("It is however quite remarkable, indeed unfathomable in our view, to suggest that Congress intended to remove all state-imposed obstacles to profitability by attaching to the Senate and House Reports a letter from the Secretary that happened to include the phrase 'the greatest return from their property.' "); *Colville*, 447 U.S. at 156 ("Washington does not infringe the right of reservation Indians to 'make their own laws and be ruled by them,' *Williams v. Lee*, 358 U.S. 217, 220 (1959) merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they are currently receiving.").

Because the tax is passed on to the non-Indian customers, the only true harm which can be asserted by the Tribe is that it cannot increase its own tax. The Tribe voluntarily agreed to limit its own taxes as long as the State tax is imposed. This Court has repeatedly held that a State tax may be imposed on non-Indians on a reservation even when a tribe is taxing the same activity, so there is no preemption or interference with tribal sovereignty because of concurrent taxing jurisdiction. *Cotton Petroleum*, 490 U.S. at 187-190; *Colville*, 447 U.S. at 157-59.

PCC's argument that economic development must be tax-free development is not supported by any federal statute or caselaw. The court of appeals correctly held that the federal interest in promoting reservation economic development is insufficient to preempt a State tax on transactions between non-Indians taking place on the reservation.

CONCLUSION

The court of appeals summarized its reasoning by stating:

> All the sales are by non-Indians to non-Indians. There is no tribal employment. There is no active tribal participation in the business. The State provides substantial governmental services to the business taxed.

Pet. App. 15. Based on these facts the court of appeals properly held that federal preemption does not prevent a State from taxing hotel and restaurant services sold to non-members of an Indian tribe by a non-Indian owned company doing business on an Indian reservation.

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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